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# THE PLIGHTS OF MIGRANT DOMESTIC WORKERS IN THE UK: A LEGAL PERSPECTIVE

A Thesis Submitted to the Middlesex University  
in Partial Fulfilment of the Requirements for the Degree of Doctor of  
Philosophy

**ISMAIL IDOWU SALIH BSc (Hons), MA, LLM**  
**Middlesex University School of Law**

Middlesex University, London  
September 2015

## **DECLARATION OF ORIGINALITY**

I, Ismail Idowu Salih declare as follow – That, to the best of my knowledge, this research is my own work. That, except where due acknowledgement has been made in the text, this submission contains no material previously published or written by another person, nor material which to a substantial extent has been accepted for the award of any other degree of the university or other institute of higher learning.

The entire law stated in this research is correct as of July 2015.

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**Date:** .....

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**Director of Studies / First Supervisor:** Prof. Malcolm Sargeant – Professor of Labour Law

**Second Supervisor:** Dr. Erica Howard – Reader in Law

**Third Supervisor:** Dr. Helena Wray – Reader in Law

## **ABSTRACT**

As a group of migrant workers, overseas domestic workers (“ODWs”) have been extensively studied in the migration, geography, and sociology disciplines. Legal scholarly publications addressing the shortfalls in the rights of these workers are beginning to catch up. The International Labour Organization (“ILO”) supports the argument that ODWs are by far the most vulnerable group of migrant workers. In the United Kingdom, the problem faced by ODWs is complicated by the hostile immigration policy and exclusion clauses in the employment law. Despite the ODWs having been exposed to a series of abuses, exploitations, and occupational health and safety hazards like workers in other occupations, they are unduly excluded from the protection and benefits available to those other workers. This thesis used a combined doctrinal and empirical approach to examine failed immigration policies, ambiguities in the employment law, exclusion clauses in the health and safety law and working time regulation, and how the justice system has been failing the ODWs. The research found the UK Government’s refusal to extend some key employment legislations to protect household workers, the non-implementation of major international frameworks that protect domestic workers, and the inseparable link between employment and immigration create hurdles to achieve justice for ODWs. The thesis argues that although ODWs’ personal attributes, such as poor socio-economic background, may constitute a vulnerability risk, ODWs’ experiences are marred by the current visa system that increases their reliance on employers and has significantly tilted the employer-employee power in the employer’s favour, leading to continued abuse, exploitation, injustice, human trafficking, and modern-day slavery. This thesis advocates a review of the policy on ODWs, a re-examination of the strict link between immigration and employment, and a review of the law on employment discrimination. Finally, the thesis found a link between culture, ethnicity, and exploitation; this link needs further study.



## **ACKNOWLEDGEMENTS**

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My sincere appreciation goes to Nick Clark of the Working Lives Research Institute; Ms Marissa Begonia, head of the Justice for domestic workers; the members of the justice for domestic workers; the North Kensington Law Centre; and the Anti-Trafficking and Labour Exploitation Unit. Without their cooperation, support, and assistance this research would not have been feasible. My sincere appreciation also goes to Prof. Julia O'Connell Davidson, whose direction led me to obtaining the empirical data on the interviews with employers of migrant domestic workers from the UK Data Archive; and to the UK Data Archive for allowing me to download and use the data.

This acknowledgement would not be complete without mentioning my beloved family. I especially owe earnest gratitude to my wife Ganiyat for her endless love, support and advice; and to my children, Baasit, Mubarrak and Malik for their infinite support and understanding.

## **DEDICATION**

This research is dedicated to my late mother, Khadijat who cared for, nourished and encouraged me with words of wisdom, and whose impact in my entire life will never be forgotten; and to my father whose support I have enjoyed since childhood; without which I would not have been able to get this far.

And also

I dedicate this thesis to my lovely wife Ganiyat, whose unquantifiable support had seen me through my research. Further, I dedicate this research to my lovely boys – Baasit, Mubarrak and Malik.

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## **ACRONYMS**

1. AC .....	Law Reports (Appeal Cases)
2. ACAS.....	Advisory, Conciliation and Arbitration Service
3. All E.R.....	All England Law Reports
4. All E.R (EC). .....	All England law reports (Commercial cases)
5. B.H.R.C .....	Bar Human Rights Committee
6. Bus L.R. ....	Business Law Reports
7. C & P .....	Carrington and Payne
8. CA Civ. ....	Court of Appeal Civil Division
9. CA Crim. ....	Court of Appeal Criminal Division
10. Ch. ....	Law Reports (Chancery Division of the High Court)
11. CJEU .....	Court of Justice of the European Union
12. C.M.L.R .....	Common Market Law Reports
13. Cmnd .....	Command papers
14. CrAppR .....	Criminal Appeals Reports
15. Crim LR .....	Criminal Law Review
16. DIALOGUE .....	Industrial and Employment Relations Department ( Branch of the ILO)
17. EA 2002 .....	The Employment Act 2002
18. EAT .....	Employment Appeal Tribunal
19. ECHR .....	European Convention on Human Rights
20. ECJ .....	European Court of Justice
21. E.C.R .....	European Court Reports
22. ECtHR .....	European Court of Human Rights
23. EEA .....	European Economic Area
24. E.H.R.R .....	European Human Rights Review



25. Eq. L.R .....	Equality Law Reports
26. ERA 1996 .....	Employment Rights Act 1996
27. ET .....	Employment Tribunal
28. ETA 1996 .....	Employment Tribunal Act 1996
29. EWCA Civ .....	England and Wales Court of Appeal Civil Division; neutral citation
30. EWCA Crim .....	England and Wales Court of Appeal Criminal Division; neutral citation
31. EU .....	European Union
32. EU – OHSA .....	European Agency for Safety and Health at Work
33. GDP .....	Gross Domestic Product
34. HMRC .....	Her Majesty’s Revenue and Customs
35. HRA 1998 .....	The Human Rights Act 1998
36. HSE .....	UK Health and Safety Executives
37. I.C.R .....	Industrial Cases Reports
38. ILC .....	International Labour Congress
39. ILO .....	International Labour Organisation
40. IMF .....	International Monetary Fund
41. Imm. A. R .....	Immigration Appeal Reports
42. I.R.L.R .....	Industrial Relations Law reports
43. ISCO .....	International Standard Classification of Occupations
44. ITUC .....	The International Trade Union Confederation
45. J4DW .....	Justice for Domestic Workers
46. K.B.....	Law reports (Kings Bench) (now Queen’s Bench Division)
47. NMWA 1998 .....	National Minimum Wage Act 1998
48. NMWR 1999 .....	National Minimum Wage Regulation 1999
49. ODWs .....	Overseas Domestic Workers (also known as Migrant Domestic Workers)
50. OECD .....	Organisation for Economic Co-operation and Development
51. OHCHR .....	Office of the High Commissioner for Human Rights
52. OJ .....	Official journal of the European Communities
53. OPSI .....	Office of Public Sector Information
54. Q.B.D .....	Queen’s Bench Division of the High Court
55. SAP – FL.....	Special Action Programme to combat Forced Labour (Branch of the ILO)
56. TRAVAIL.....	Condition of Work and Employment Programme (Branch of the ILO)
57. TUC .....	Trade Union Congress
58. TURLCA 1992.....	The Trade Union and Labour Relations (Consolidation) Act 1992

59. UDHR ..... Universal Declaration of Human Rights
60. UK ..... United Kingdom
61. UKAIT .....Law Report ( United Kingdom Asylum and Immigration Tribunal)
62. UKBA ..... United Kingdom Border Agency
63. UKFTT ..... United Kingdom First Tier Tribunal
64. UKHL .....United Kingdom House of Lords (2001-2009); neutral citation
65. UK P.C .....United Kingdom Privy Council (from 2001) ; neutral citation
66. UKSC ..... United Kingdom Supreme Court (from 2009); neutral citation
67. UN ..... United Nations
68. UNHCR ..... United Nations High Commissioner for Refugees
69. UNTS .....United Nations Treaty Series
70. UN WOMEN ...The United Nations Entity for Gender Equality and the Empowerment of Women
71. WHO ..... World Health Organisation
72. W.L.R .....Weekly Law Reports
73. WIEGO ..... Women in Informal Employment: Globalizing and Organising

### **LIST OF CASES**

1. *Adekeye v The Post Office* (No.2) [1995] I.C.R. 540; [1995] I.R.L.R. 297; Times, February 23, 1995. EAT
2. *Addis v Gramophone Company Limited* [1909] A.C. 488
3. *Akwiwu v Onu* [2013] I.R.L.R. 523; [2013] Eq. L.R. 577; (2013) 157(19) S.J.L.B. 35
4. *Albert Ruckdeschel & Co v Hauptzollamt Hamburg-St Annen* (117/76) [1977] E.C.R. 1753; [1979] 2 C.M.L.R. 445
5. *Alcan Extrusions v Yates* [1996] I.R.L.R. 327
6. *Allen v Houna* [2012] EWCA Civ 609; [2012] I.R.L.R. 685 (CA (Civ Div))
7. *Allen v TRW Systems Ltd* [2013] I.C.R. D13 EAT
8. *Arbeiterwohlfahrt der Stadt Berlin EV v Botel* (C-360/90) [1992] E.C.R. I-3589; [1992] 3 C.M.L.R. 446
9. *Arora v Rockwell Automation Ltd* [2006] UKEAT 0097\_06\_2104
10. *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469
11. *Ashmore, Benson, Pease & Co v Dawson* [1973] 1 W.L.R. 828

12. *Asuquo v Gbaja* (unreported) ET 3200383/2008 (judgment on 2 January)
13. *Autoclenz Ltd v Belcher* [2010] I.R.L.R 70, CA (Civ. Div.)
14. *Aziz v Republic of Yemen* [2005] EWCA Civ 745; [2005] I.C.R 1391
15. *B and B Viennese Fashions v Losane* [1952] 1 All E.R 909
16. *Baccus Srl v Servicio Nacional del Trigo* [1957] 1 Q.B.D 438
17. *Baldwin v British Coal Corporation* [1995] I.R.L.R 139 (Q.B.D)
18. *Barber v Guardian Royal Exchange Assurance Group* (C-262/88) [1991] 1 Q.B.D 344; [1991] 2 W.L.R. 72; [1990] 2 All E.R. 660; [1990] E.C.R. I-1889
19. *Bampouras v Edge Hill University* (2010) 154(4) S.J.L.B. 28
20. *Benkharbouche v Sudan, Janah v Libya* UKEAT/0401/12/GE
21. *Berg v Blackburn Rovers Football Club & Athletic plc.* [2013] EWHC 1070 (Ch), [2013] I.R.L.R 537
22. *Beveridge v KLM UK Ltd* [2000] I.R.L.R 765 EAT
23. *Bilka-Kaufhaus GmbH v Weber von Hartz* (170/84) [1986] E.C.R. 1607; [1986] 2 C.M.L.R. 701
24. *BO (Domestic worker – connection with sponsor) Nigeria* [2007] UKAIT 00053
25. *Bouabdillah v Commerzbank AG* [2013] ET/2203106/12
26. *British Home Stores v Burchell* [1978] I.R.L.R 379
27. *Brown v Rentokil Ltd* (C-394/96) [1998] All E.R. (EC) 791
28. *Brown v Secretary of State for Scotland* C-197/86 [1988] 3 C.M.L.R. 403
29. *Bruce v Wiggins Teape (Stationery) Ltd* [1994] I.R.L.R 536 EAT
30. *Brunnhofen v Bank der Österreichischen Postsparkasse AG* (C-381/99) [2001] All E.R. (EC) 693; [2001] E.C.R. I-4961; [2001] 3 C.M.L.R. 9; [2001] I.R.L.R. 571
31. *Buckland v. Bournemouth University Higher Education Corp* [2010] EWCA Civ. 121
32. *Byrne Bros (Formwork) Ltd v Baird* [2002] I.C.R. 667
33. *Callo v Brouncker* (1831) 4 Carrington and Payne 518, 172 All.E.R
34. *Canada Life Ltd v. Gray & Anor* [2004] UKEAT 0657\_03\_1301 (13 January 2004)
35. *Caramba-Coker v Military Affairs Office of the Kuwait Embassy* No. EAT/1054/02/RN
36. *Carter v Qatar Airways Ltd* [2003] UKEAT 0960\_02\_0306
37. *Catherine Haigh Harlequin Hair Design v Seed* [1990] I.R.L.R 175, EAT
38. *Chief Constable of West Yorkshire v Khan* [2001] UKHL 48; [2001] 1 W.L.R. 1947

39. *Chief Constable of West Yorkshire v A* [2004] UKHL 21; [2005] 1 A.C. 51
40. *Clark v Nomura International PLC* [2000] I.R.L.R 766
41. *Clouston & Co Ltd v Corry* [1906] AC 122
42. *CN v United Kingdom* (4239/08) (2013) 56 E.H.R.R. 24; 34 B.H.R.C. 1
43. *C.N. and V. v. France* (no. 67724/09) ECHR 374 (2012) 11.10.2012
44. *Collins v. Blanter* (1765) 2 Wils. K.B 341; 1 Sm.L.O. 7th ed. 369
45. *Commission of the European Communities v United Kingdom* (C-484/04) [2006] 3 C.M.L.R. 48
46. *Connolly v Whitestone Solicitors* [2011] UKEAT 0445\_10\_2406
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# **CHAPTER ONE**

## **Context, Aims and Objectives, and Research Questions**

### **1.1 AIMS OF THIS CHAPTER**

The aims of this chapter that sets the pace for the research on the plights of domestic workers in the UK are to (a) define domestic work (b) contextualise the problems of domestic workers (c) explain what motivated this research and (d) outline the aims and objectives of the thesis as well as the research questions.

### **1.2 GENERAL INTRODUCTION**

On the face of it, other than fitting into an umbrella of works that are performed predominantly within the household, there is no single definition of domestic work.<sup>1</sup> The link between the household and domestic work featured in the ILO (1951: page unknown) description of a domestic worker as a “wage earner working in a private household under whatever method and period of remuneration, who may be employed by one or several employers”. This description differentiated between someone who performs domestic work for his/her family and a paid worker who may not be a member of the family. The problems facing domestic workers in the UK and around the world are not contemporary but something that has been going on for ages. It is therefore not strange that the plight of these workers has been studied extensively (Amnesty International, 2007; Anderson, 2000; Delap, 2011; Hiller & Saxteins, 2009; HRW, 2014; ILO, 2013; Kalayaan, 2014; Lutz, 2012; Parreñas, 2001). But, the impact of law on the problems of the workers and the role of law in solving them has yet to be fully explored.

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<sup>1</sup> For more on the difficulties in defining domestic workers, see D’Souza, A (2010) *Moving toward Decent work for Domestic workers: An Overview of the ILO’s work*, Working Paper 2 / 2010, ILO Bureau for Gender Equality, p. 9

Domestic workers worldwide first gained international attention around 1936 when the ILO voiced concern that convention (No. 52)<sup>2</sup> adopted by the International Labour Conference (“ILC”) excluded domestic workers from the right to six days of paid leave that was available to workers in the manufacturing and a range of other industries. To set a framework aimed at regulating domestic work worldwide, ensuring decent work for them, alleviating their problems, and providing them with better legal protection, the ILO has enacted a series of resolutions and has called on signatory States to ensure a better deal for domestic workers.<sup>3</sup> The ineffectiveness of previous measures prompted the adoption of Convention 189 in 2011. The Convention, that sets the current framework for the protection of domestic workers worldwide, has been ratified by several countries including Italy and Germany, but the UK Government is yet to recognise it.<sup>4</sup> Whilst the UK Government has consistently maintained ODWs in the UK are well protected by law,<sup>5</sup> evidence available in the literature shows the ODWs remain excluded from some important aspects of the employment law,<sup>6</sup> health and safety protections,<sup>7</sup> and working time regulations. There is also evidence that they are continually exposed to a wide range of hazards, abuse and exploitations (HRW, 2014; Kalayaan, 2014; Sargeant, 2014). In addition, domestic workers are barely protected by law (ILO, 2013); there is evidence to suggest employers often disregard their domestic workers’ human rights (Albin and Mantouvalou, 2012), discriminate against them, and expose them to servitude, exploitation, and abuse (HRW, 2014).

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<sup>2</sup> ILO: *Resolution concerning Holidays with Pay for Domestic Servants, submitted by the Committee on Holidays with Pay*, International Labour Conference, 20th Session (Geneva, 4–24 June 1936)

<sup>3</sup> In 1948, the ILO adopted a resolution concerning the conditions of employment of domestic workers (see ILO: *Record of Proceedings*, International Labour Conference (ILC), 31st Session, 1948, Appendix XVIII: Resolutions adopted by the Conference, pp. 545–546); In 1965, it adopted a resolution calling for active action on the working condition of domestic workers (see ILO: *Official Bulletin (Geneva)*, July 1965, Supplement I, pp. 20–21); In 1970, ILO published the first survey ever on the status of domestic workers across the world; (see ILO: *The employment and conditions of domestic workers in private households: An ILO survey*, International Labour Review, Oct. 1970, pp. 391–401)

<sup>4</sup> ILO (NORMLEX): Ratifications of C189 - Domestic Workers Convention, 2011 (No. 189).

<sup>5</sup> See for instance UK parliament – *House of Lords Hansard, Migrant Domestic Workers*, 4 June 2013, Column WA173.

<sup>6</sup> See Regulation 2(2) of the National Minimum Wage Regulations 1999 No. 584. Further discussion on ODWs entitlement to the minimum wage is available at chapter seven of this thesis.

<sup>7</sup> See section 51 of the Health and Safety at Work etc. Act 1974, c.37

However, the assertion that domestic work that is widely performed by millions of men, women, and children around the world “is rooted in the global history of slavery, colonialism and other forms of servitude” (ILO, 2010:1), underscores the aspect of natives and migrants who willingly perform domestic work; it could explain the complexity in dealing with the problems facing modern day ODWs. Linking domestic work to chores that are performed by the less privileged in society immediately undermines the significance of the job (Anderson, 2001) and diminishes the status of those doing it (Delap, 2011). The stereotype of domestic workers may have contributed to the inaction or shortcomings of policymakers to enact measures to improve their employment rights, regulate domestic work, and extend all the legal protections that are available to the other workers to them. As such, despite their longstanding problems, the plight of domestic workers is often considered less important by policymakers (Schwenken, 2005). Consequently, the negative experience of domestic workers worldwide, continues unabated (ILO, 2013; Kalayaan, 2014). Thus, “while the rights of domestic workers are expanding in international law, including through the adoption of the ILO Domestic Workers Convention 2011, migrant domestic workers remain particularly vulnerable to employment-related abuse and exploitation”.<sup>8</sup> Despite the abolition of slavery,<sup>9</sup> the adoption by the United Nations (“UN”) general assembly of a declaration on the granting of independence to colonial countries and peoples,<sup>10</sup> and the end of colonialism in Europe between 1946 and 1976,<sup>11</sup> contemporary domestic workers in the UK are not in a better position than their Victoria era counterparts who were hardly recognised as workers, unprotected by law, stereotyped, and often treated with prejudice (Davidoff, 1974; Delap, 2012).

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<sup>8</sup> Murphy, C (2013), *The enduring vulnerability of migrant domestic workers in Europe*, I.C.L.Q. 2013, 62(3), p.599

<sup>9</sup> The Slavery Abolition Act 1833 (citation 3 & 4 Will. IV c. 73)

<sup>10</sup> UN General Assembly, *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Resolution 1514 (XV) New York, 14 December 1960

<sup>11</sup> See Grossman, H.I. and Iyigun, M.F (1997) *Population Increase and the End of Colonialism*, *Economica*, New Series, 64(255), pp. 483-493

Further to the inherent difficulty in accepting domestic work as just another kind of paid job (Anderson 2001), the private nature of the household remains one of the factors that hinder the regulation of domestic work (Gower, 2012), increase the workers' invisibility to the public, reduce their protection in the labour market, and complicate their plights (ILO, 2013). The unusual nature of the household as a workplace creates friction between public and private law. On the one hand, because the household is a private family unit, the Government is unlikely to legislate on private matters that have no significant benefit to the public. On the other hand, because the household employs people other than family members to carry out domestic chores, it is appropriate to consider extending workplace protection to household workers; however encroaching it might appear.

As a highly feminised job (ILO, 2013) in the informal sector (ILO, 2010), the household predisposes workers to a sub-standard otherwise precarious working condition (Sargeant, 2014), and a high degree of vulnerability to hazards.<sup>12</sup> In addition to employment-related problems and maltreatment by employers, immigration constraint complicates the experience of ODWs (ILO, 2010; Piper, 2005; Triandafyllidou, 2013). In the UK, politics often influence the public perception of migrants (Jayaweera and Anderson, 2008). Further, the UK elite-led immigration policies (Consterdine, 2013; Mulvey, 2010) often changes according to the political agenda of the ruling party (Gower and Hawkins, 2013). While highly skilled migrants from countries outside the European Union ("EU")<sup>13</sup> are considered essential and economic viable (Home Office, 2012), low-skilled migrants from countries outside the EU are often seen as unwelcome and an economic liability (Devitt, 2012; Lowell, 2005).

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<sup>12</sup> The lack of official or any record on injuries and health and safety breaches in the households could be linked to the Government failure to extend health and safety laws to cover household workers. This exclusion is discussed further elsewhere in this thesis.

<sup>13</sup> In line with the UK obligation as a member of the EU, workers from the EU whether skilled or unskilled are exempted from such policy.

Whilst the policies that prefer one group of migrants over the other could be argued as essential in a democratic society, it does not relieve the Government of its duty to protect the vulnerable such as the ODWs who are amongst the low-skilled migrants (Clark and Kumarappan, 2011). The UK Government introduced a new ODWs visa regime on 6<sup>th</sup> April 2012. Unlike the pre- 6<sup>th</sup> April 2012 ODWs visa regime (“old visa”) that was renewable and gave the bearers the opportunity to change employers in the UK, the new visa is non-renewable, lasts a maximum of 6 months, and prevents workers from changing employers. Consequently, those on the new visas are potentially tied to their employers without any real opportunity to escape exploitive or abusive employers (Kalayaan, 2014). Given the prevalence of women in the sector, one may argue the need to balance Government economic policies with the duty to protect the vulnerable such as migrant women (Hiller & Saxtein, 2009) is highly desirable.

This thesis on the legal perspective of domestic workers’ problems is informed by the researcher’s work experience at various law centres in and around Greater London. The researcher’s attention was caught by (a) the link between employment and immigration law in cases involving the vast majority of domestic workers that he came across (b) the complex legal problems the workers presented with (c) their poor socioeconomic background, and (d) personal attributes such as very little or no competency in English language. Instead of sympathising with them, the researcher took an interest in exploring and understanding their problems, as well as in finding the root of the problems with a view to suggesting the better way forward. This research that seeks to explore the role of law on the problems facing domestic workers in the UK consists of a legal exploration and an empirical investigation conducted with informants, employers, and domestic workers in and around Greater London. Given that the empirical investigation for this thesis adopted a qualitative research method, the researcher does not intend to generalise the research findings.

However, considering Falk and Guenther (2007) argument that one of the aims of conducting research is to build the evidence base to inform strategic or policy directions, the researcher intends to use the empirical research findings to understand and explain how UK laws (immigration, employment, and health and safety) impact on domestic workers irrespective of where they are employed in the UK.<sup>14</sup>

### **1.3 UNDERSTANDING DOMESTIC WORK**

Domestic work can be viewed under different lenses (WIEGO, 2011). For instance, domestic work can be considered as any task that is listed under groups 5 and 9 of the International Standard Classification of Occupations (ISCO-88).<sup>15</sup> In this instance, jobs like housekeeping, restaurant services, and cooking that are listed under sub group 512 of group 5 as well as childcare and home-based personal care that are listed under the sub group 513 can be regarded as domestic work. Further, domestic and related helpers, cleaners and launderers that fall under sub group 913 of major group 9 can be regarded as domestic workers. The issue with this principle is that it generalises the definition of domestic work beyond the context of households to cover jobs in the hotel, catering and restaurant industry. In a different lens, any task that is performed within the households can be regarded as domestic work. Whilst this principle appears to be more concise, it is unclear if personal security/bodyguard and personal driver who may be engaged within and outside the households can also be seen as domestic workers.

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<sup>14</sup> Although some of the Westminster Parliament powers were devolved to the Scottish Parliament, the National Assembly for Wales, the Northern Ireland Assembly and to some extent, the London Assembly; Wales, Northern Ireland and Scotland are not independent countries. The Westminster' immigration rule applies throughout the UK. Further, employment and health and safety laws enacted by the Westminster Parliament apply throughout the kingdom, albeit with few exceptions.

<sup>15</sup> ISCO is an ILO tool ISCO for organising jobs into a clearly defined set of groups according to the tasks and duties undertaken in the job. Its main aims are to provide: a basis for the international reporting, comparison and exchange of statistical and administrative data about occupations; a model for the development of national and regional classifications of occupations; and a system that can be used directly in countries that have not developed their own national classifications. See <http://www.ilo.org/public/english/bureau/stat/isco/> last accessed August 11, 2015



The third principle is to consider domestic work as tasks performed by those who are employed by households specially to serve those households. This third principle is preferred because it improved on the second principle and removed ambiguities that may be associated with the first principle. The principle linked domestic work to the household and simplify the definition of domestic workers are those employed by the households (private or diplomatic). The link between domestic work and the households is stressed under Article 1 of the ILO convention 189 that stated that the term domestic work means work performed in or for a household or households, and the term domestic worker means any person engaged in domestic work within an employment relationship.<sup>16</sup> Furthermore, the UK visas and immigration modernized guidance for how decisions are made about applications for leave from domestic workers in private households has suggested:

[d]omestic workers may include cleaners, chauffeurs, gardeners, and cooks, those carrying out personal care for the employer or a member of the employer's family and nannies, if they are providing a personal service relating to the running of the employer's household.<sup>17</sup>

Going by the above, one may conclude that different groups of workers may refer to themselves or be referred to as domestic workers in so far as they are employed by household/family unit and the paid activities in which they are engaged is not just situated within the households but is also not for commercial purpose.

## **1.4 DOMESTIC WORK IN THE UK – THE BACKGROUND**

Historically, domestic work in the UK is performed mainly by poor and destitute natives, and by slaves (Delap, 2012). Perhaps, due to globalisation, care deficits (Ehrenreich and Hochschild, 2003) in many European households (Parreñas 2001) have prompted the

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<sup>16</sup> See ILO - *Domestic Workers Convention, 2011 (No. 189)*, Convention concerning decent work for domestic workers, Geneva, 100th ILC session (16 Jun 2011)

<sup>17</sup> GOV.UK - WRK2.1.4 Job description, overseas domestic workers in private households: WRK2.1, Published 9 January 2014.

recruitment of migrants, especially women from the developing countries (Lutz 2008) to fill in the gap and assist with the dirty work that families are unwilling to do (Anderson 2000). Generally speaking, employment relationship in the UK is historically built on a master (employer) and servant (employee) relationship (Deakin, 2001). To ensure power equilibrium, the UK Government has over the years introduced policies and laws in favour of the employees.<sup>18</sup> However, domestic workers are unduly excluded from protection under the minimum wage, health and safety protection, working time regulations, holiday pay, sick pay, and protection from harassment and discrimination (HRW, 2014). As such, employment relationship in the households has remained essentially unbalanced as employers retain absolute or near absolute power over employees (Davidoff and Hawthorn, 1976; Deakin, 2001). Thus, amongst the aspects of domestic work that have remained unchanged are their limited employment rights and the lack of legal protection (Davidoff, 1974).

There is evidence to suggest most employers of domestic workers in the UK do not see themselves as legal employers, thereby avoiding treating their workers as employees and according to the law (Anderson, 2001; HRW, 2014). The UK Government's turning a blind eye to the problems of domestic workers (Clark & Kumarappan, 2012), the lack of sensitivity to their plight, and the introduction of a very strict ODWs visa regime in April 2012 have together increased the precarity of domestic work (Sargeant, 2014; WIEGO, 2014) as well as the vulnerability of the workers (Kalayaan, 2014). The plight of the ODWs is not helped by the misconception that a unique employer-employee relationship operates in households, such that live-in domestic workers are presumed to be family members of the employers (Graunke, 2003; Keklik, 2006; Moors, 2003).

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<sup>18</sup> For more on the employment law that favours employees, see Lewis and Sargeant (12<sup>th</sup> edn.) (2013) *Employment Law: The Essential*, London: Chartered Institute of Personnel and Development.

## 1.5 GLOBALISATION, MIGRATION, AND DOMESTIC WORK

According to OECD (2009), the link between globalisation and immigration is inseparable. Although “globalisation offers great opportunities for human advancement... it also entails considerable risk” (Bonilla García and Gruat, 2003: 6). These risks include the facilitation of cross border migration,<sup>19</sup> the effect of which includes transatlantic economic downturn, poverty, social inequalities, human trafficking and modern day slavery.<sup>20</sup> In the view of the Office of the High Commissioner for Human Rights (OHCHR, 2015), around 232 million people are believed to be living outside their country of origin for various reasons.<sup>21</sup> Whilst conflicts and persecutions force some people to migrate (UNHCR, 2007), others choose to migrate in search for better opportunities abroad (IOM, 2013).

Although all forms of migration attract global attention, due to its global economic impact,<sup>22</sup> migration for the purpose of employment ranks amongst the world’s most contested public policies.<sup>23</sup> “The plight of migrants is complicated by the challenges that labour-based migration poses to policymakers in the twenty-first century” (IOM, 2002: 2). The relevance of globalisation to domestic work is that the availability of different travelling opportunities has allowed migrants from developing countries to migrate to developed countries for greater opportunities (Cox, 2002; Lutz, 2012; Salazar Parrenas 2001).

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<sup>19</sup> For more on the impact of globalisation on migration, see IOM (2003) *Migration in Global criticised World*, MC/INF/268, 88<sup>th</sup> Session, 10 November 2003; Home Office UK Border Agency (2011), *UK Border Agency Business Plan*, April 2011 - March 2015; Fassmann, H., Haller, M., and Lane, D (2009), *Migration and Mobility in Europe: Trends, Patterns and Control*, Cheltenham: Edward Elgar Publishing.

<sup>20</sup> See Hyman, R (2003) *The Historical Evolution of British Industrial Relation*, in P. Edwards (ed.), *Industrial Relation Theory and Practice*, 2<sup>nd</sup> Edition, Oxford: Blackwell, pp. 37 – 57

<sup>21</sup> <http://www.ohchr.org/EN/Issues/Migration/Pages/MigrationAndHumanRightsIndex.aspx>

Last accessed August 10, 2015

<sup>22</sup> For the impact of international migration on economic, see D. Ratha; S. Mohapatra, and E. Scheja, *Impact of Migration on Economic and Social Development: A Review of Evidence and Emerging Issues*, Policy Research Working Paper 5558, The World Bank Development Prospects Group Migration and Remittances Unit & Poverty Reduction and Economic Management Network 2011.

<sup>23</sup> Anderson, B., Ruhs, M., Rogaly, B and Spencer, S., *Fair enough? Central and East European migrants in low-wage employment in the UK*, York: Joseph Rowntree Foundation 2006.

There is evidence to suggest some of these migrants end up taking on the role of household workers in the host countries (Cox and Watt, 2002; George, 2005; Lutz, 2011). While job-seeking migrants may consider immigration a good thing, the issue of immigration, its effect on the host country's national economy, and the strains posed by economic downturn are amongst the challenges that confront policymakers in the twenty-first century (Hussmanns, 2005 IOM, 2013; UNCTAD, 2011). The UK Government aims to reduce net migration and allows only the brightest and best to come and work in the country (Home Office, 2012). As a result, whilst being strict on low-skill migrant workers such as domestic workers, the Government has prioritised business entrepreneurs and highly skilled workers (Martin, 2013; Murray, 2011). Due to lack of protection and the Government's strict policy on them, ODWs continue to experience serious abuse and exploitation that has been tagged 'modern day slavery' (HRW, 2014; Kalayaan, 2014).

## **1.6 GENDERING DOMESTIC WORK**

The patriarchal notion of men as the family breadwinner and women as the housekeeper has eroded (Githens, 2013) as many women (particularly in the developed countries) continue to compete with men for paid jobs outside the household (Addabbo & Arrizabalaga, 2010). However, when it comes to performing domestic chores, there are evidences to suggest women continue to do the larger proportion of it comparing to men (Eurofound, 2009; Cooke, 2011; Del Boca & Locatelli, 2008). It is also the case that the vast majority of paid domestic workers worldwide are women (HRW, 2014; ILO, 2009). Women domestic workers often experience gender discrimination at their places comparing to men. For instance, where men engage in domestic work, they often have better paid tasks such as gardening or chauffeuring (ILO, 2009:6).

Given the evidence in the literature that the vast majority of those who employ domestic workers are women (Anderson, 2008; Lutz, 2008, WIEGO 2014), the fact that domestic workers (majority of whom are women) sometimes if not often experience ill treatment by their employers (HRW, 2014; Oxfam & Kalayaan, 2008) raises questions of a new wave of social inequality and divisions between women (Peterson, 2007), and queries “race and class relations among women” (Bakan and Stasiulis, 1995: 303). The aspect of women employing female domestic workers continue to puzzle feminists who stand for the rights and equality of all women (Anthias & Lazaridis, 2000; Ehrenreich & Hochschild, 2003; Kofman, 2001; Ross, 2003; Salazar Parreñas, 2001; Tania, 1991), and makes the discourse on gender discrimination more difficult to argue. Against this backdrop, the advancement of gender equality through decent work was enshrined amongst the frameworks that were set out under the ILO convention 189 in 2011. Meanwhile, in the UK like in most part of the world where labour laws have little protection for domestic workers (ILO, 2013), it could be argued the lack of legal protection amounts an indirect discrimination against women.

## **1.7 PAINTING DOMESTIC WORKERS PROBLEMS**

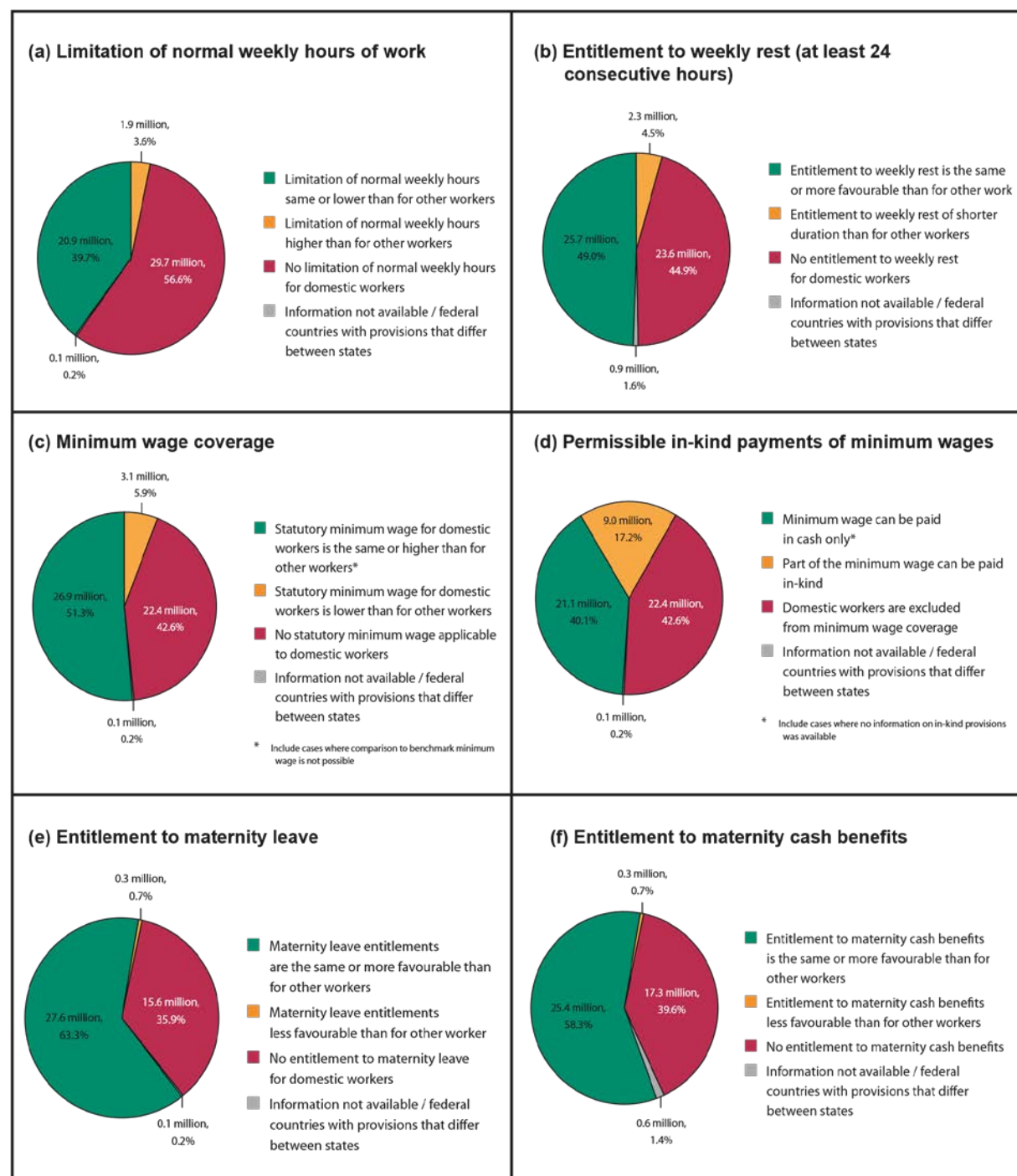
Pollert and Charlwood (2009) have argued that employees without collective agreement or union membership are vulnerable workers. Unlike in other EU countries like Italy and Spain where domestic workers are covered by collective agreements,<sup>24</sup> there is no collective agreement for domestic workers in the UK and the work is unregulated. The exclusion of UK domestic workers from vital employment and health and safety protections allowed unscrupulous employers to exploit them; thereby putting the workers in a dangerous and economically disadvantaged position.

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<sup>24</sup> See ILO – *Domestic workers negotiate new collective agreements in Uruguay and Italy*, Document | 02 May 2013. [http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS\\_212212/lang--en/index.htm](http://www.ilo.org/travail/areasofwork/domestic-workers/WCMS_212212/lang--en/index.htm) last accessed August 16, 2015

Of at least 52.6 million people (17% men and 83% women) who work as domestic workers across the world in 2010 (see fig. 1), “only 10 percent is covered by the general labour law that protect the other workers (ILO, 2013: 50).

**FIGURE 1: PROTECTION OF DOMESTIC WORKERS UNDER NATIONAL LEGISLATION, 2010**



Source: ILO 2013

In the UK, it is not compulsory for employers to issue contract of employment to the workers. But, it is mandatory for employers to issue their employees with a statement of employment particulars that details the terms and condition of their agreement.<sup>25</sup> Despite the evidence that in the other professions, employers often take it upon themselves to issue their employees with a full contract of employments (Deakin and Morris, 2012), employers domestic workers hardly issue any contract or the correct statement of terms and condition to their workers (HRW, 2014; Kalayaan and Oxfam, 2008). Further, despite the Home Office effort to ensure the ODWs are issued with a statement of terms and condition,<sup>26</sup> there is evidence to suggest that most employers of domestic workers often choose to circumvent or mislead the Home Office.<sup>27</sup> History has shown that the work agreement between employers and their domestic workers often tend to be essentially verbal (Anderson, 2001; Kalayaan and Oxfam, 2008). The lack of documentation even makes it easier for the employers to arbitrarily change the terms of the agreement and/or dismiss the worker without any warning and/or any benefit. The current ODWs visa which, came into effect on 6<sup>th</sup> April 2012 restricted to six months, the maximum stay of newly admitted domestic workers to the UK. Unlike their counterparts on the pre 6<sup>th</sup> April 2012 ODWs visa, those on the new visa are unable to renew their visa and are unable to change employers. These restrictions put the ODWs at the mercy of their employers and reduce their ability to protect themselves; thereby promoting modern day slavery (HRW, 2014). According to a Kalayaan publication on the status of the current ODWs visa,<sup>28</sup> between 6<sup>th</sup> April 2012 and 6<sup>th</sup> April 2014, a total of 402 domestic workers reported to the organization (see fig 2).

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<sup>25</sup> See the Employment Rights Act 1996 c.18, [London: OPSI](#), sections 1, 2, & 4

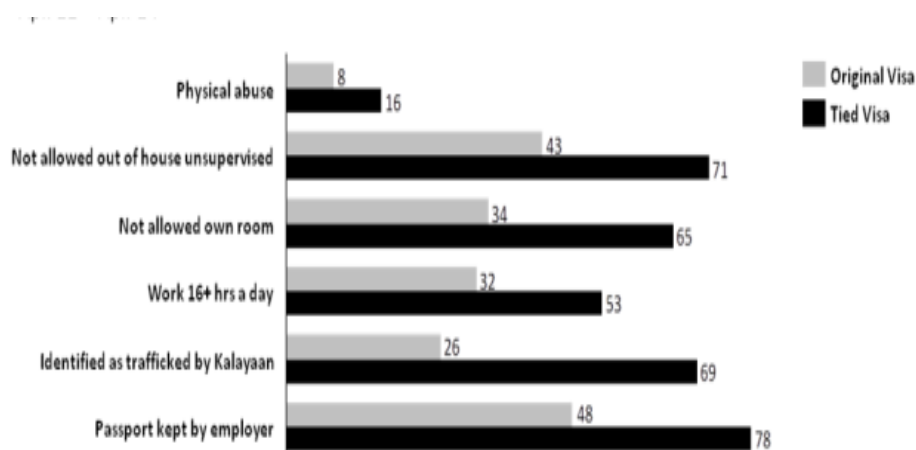
<sup>26</sup> Home Office – *Domestic Workers in Private Households*, Guidance v9.0, Valid from 12 December 2013

<sup>27</sup> Although employers do issue some form of contract to enable the worker to apply for the ODWs visa and in the case of those admitted before 6<sup>th</sup> April 2012, to enable them renew their visas, the visa issued to the Home Office do not always represents the actual agreement between the parties. See for instance, *Taiwo v Olaigbe*, EAT (0254/12)

<sup>28</sup> Kalayaan (2014) *Still enslaved: The migrant domestic workers who are trapped by the immigration rules April 2014*. London: Kalayaan

Although, only 120 of those who reported were on the new visa comparing to 282 on the old visa, the abuse and exploitation reported by those on the new visa is more than that reported by those on the old visa.

**FIGURE 2: COMPARISON OF ABUSE REPORTED TO KALAYAAN IN PERCENTAGE (APRIL 2012 – APRIL 2014)**



Source: Kalayaan 2014

It is visible from the report that almost three quarters of those on the new visa reported never being allowed out of the house unsupervised (71%) compared to 43% of those on the old visa. Further, 65% of those on the new visa did not have their own rooms, share room with the children or slept in the kitchen or lounge compared to 34% of those on the old visa. 53% of those on the new visa work more than 16 hours a day compared to 32% of those on the old visa. 60% of those on the new visa reports pay of less than £50 a week, compared to 36% on the old visa. Furthermore, a subsequent report by HRW (2014) confirmed that domestic workers often have their passport confiscated by the employers, confined to the home, experience physical and psychological abuse, subject to extremely long working hours with no rest days, and are either paid very low wages or no wages at all.



Perhaps the recognition that domestic workers are excluded from most international labour frameworks that protect workers<sup>29</sup> prompted the adoption of convention 189 in 2011 by the ILC. The convention which sets an inclusive framework for domestic workers around the world came into effect on 5<sup>th</sup> September 2013. Significantly, amongst the countries that have ratified and implemented it are Italy and Germany. So far, the UK Government has refused to recognise it. Thus, denying UK domestic workers the chance to become more visible to the public and the opportunity to improve their experience. Further, the unwillingness of the UK Government to extend the health and safety law and working time protection to those employed in the households, and the turning of a blind eye towards the plights of ODWs continue to impact on the negative experience of domestic workers in the UK.

## **1.8 AIMS OF THE THESIS AND RESEARCH QUESTIONS**

This research aims to focus on the impact of law and the legal institutions on the problems of the ODWs without ignoring the socio-economic and political dimension as well as personal factors of the workers that make their vulnerability in the labour market more probable. To achieve this aim, this research will:

1. Investigate the factors that predispose the ODWs to vulnerability in the labour market and the root of their problems in the UK
2. Investigate the importance of domestic workers' visas from a legal standpoint
3. Investigate the availability and effectiveness of the protection for those who have been trafficked for the purpose of domestic servitude
4. Explore the socioeconomic impact of ODWs on the British economy
5. Explore the use of legal mechanism in resolving solving the problems of ODWs.

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<sup>29</sup> See ILO – *Relevant ILO instruments on Domestic Work* - Key ILO instruments, Document | 11 December 2009  
[http://www.ilo.org/travail/areasofwork/WCMS\\_151734/lang--en/index.htm](http://www.ilo.org/travail/areasofwork/WCMS_151734/lang--en/index.htm) last accessed August 16, 2015

Considering that research question “define an investigation, set boundaries, provide direction, and act as a frame of reference for assessment” (O’Leary, 2010: 47), the questions that will be in focus in this research are as follows:

- 1) Do the restrictions on the ODWs visa increase their vulnerability in and outside the labour market? If yes, to what extent?
- 2) Are there any differences between ODWs in private households and ODWs in diplomatic households, and, if so, what are they?
- 3) What are the lived experiences of ODWs in the UK? Do these experiences contrast with the experience of ODWs in continental Europe and around the world?
- 4) Is there any difference between ODWs in private households and ODWs in diplomatic households, and, if so, what are they?
- 5) Why do employers of domestic workers prefer to recruit migrants?
- 6) In what way, if any, do ODWs help shape the British economy?
- 7) Is the use of ‘au pair’ a valid and/or sustainable alternative to ODWs?
- 8) To what extent, if any, are ODWs legally protected in the UK?
- 9) What status do ODWs hold in the UK and what does the future hold for them?

## **1.9 OBJECTIVES OF THE THESIS**

Generally, this research will contribute to our in-depth understanding of the vulnerability of domestic workers and the precariousness of their work. More specifically, this thesis will explore the impact of immigration policies and law, employment law, and public international law on the experience of ODWs in the UK. This thesis will also assist our understanding of the tension between the problems faced by ODWs and the need for effective immigration control; and allows suggestions to be made on the best ways to engage and managing this tension.

## **1.10 SYNOPSIS OF THE THESIS**

This research consists of seven chapters. As the introductory chapter, chapter 1 provides insights into the research by defining domestic work and contextualising the problems of the workers. The chapter also highlights the aims and objectives of the research as well as the research questions.

Chapter 2 concentrates on the review of relevant non legal literature from national and international sources. The chapter sheds more light on the problems of domestic workers by identifying the concepts of vulnerability and precariousness as the two leading features in their problem. It also identifies the unwillingness of the UK Government to adopt most of the international framework that could improve the experience of domestic workers in the UK.

Chapter 3 discusses the review of legal literature and focuses on the identification of both national and international laws that are relevant to the plight of domestic workers. The chapter highlights how the UK Government immigration policy and immigration law impact on employment in the private and diplomatic households. The chapter also highlights the nature of the current ODWs visa, how the visa affects domestic workers experiences, and discusses the future for the domestic workers. Furthermore, the chapter discusses the impact of employment law on the experiences of domestic workers. In particular, the exclusion of domestic workers from minimum wage, health and safety, and working time protections. Lastly, the chapter discusses legal and institutional barriers that hinder domestic workers from accessing justice, the link between immigration and employment and the effect of the doctrine of illegality. The chapter identifies a gap in the study of the impact of law on the problems of these workers and highlights the need for the current research.

Chapter 4 starts by discussing the theoretical frameworks that underpin this research. The chapter discusses the methodological processes relevant to the research and attempts to justify the use of a combined legal and empirical research methods in the exploration of the identified phenomena. Further, the chapter explains the method of data collection, strategy of recruiting the participants, method of data storage, system of data analysis, and provides a reflection on the thesis.

Chapter 5 discusses the empirical research and provides a thematic analysis of the findings. It also attempts to triangulate the results of the empirical research with the review of literature.

Chapter 6 that discusses the doctrinal research shows a gap in the law and what employers and domestic workers believed to be the law. The chapter highlights the fact that law and the legal system are yet to come into terms with the real experience of domestic workers. It also shows the majority of the employers of domestic workers are not willing to support the regulation of domestic work in the UK.

Chapter 7 which is the last chapter, concludes that the root of domestic workers' problem in the UK lies generally in both immigration and employment laws that fail to provide any/or adequate protection for them, but more squarely on the immigration law that do not give the workers the chance to mitigate their vulnerability.

## **1.11 CHAPTER CONCLUSION**

This chapter has contextualised the research on domestic workers. It has highlighted some of the problems facing domestic workers, especially the migrants in the UK. The chapter has explained the aims and objective of the thesis, highlighted the questions to guide this research, and provided an overview of all the chapters of this thesis.

## **CHAPTER TWO**

### **A review of the literature: Making a case for the thesis**

#### **2.1 AIMS OF CHAPTER**

This chapter aims to conduct an in-depth exploration of both published and unpublished documents on domestic workers with a view to critically explore the current state of affairs of domestic workers in UK private and diplomatic households. The chapter also aims to examine and discuss international frameworks that guide and/or relate to the affairs of domestic workers in the UK, and what their legal position is.

#### **2.2 INTRODUCTION TO CHAPTER**

To obtain academically-rich data on the ODWs in the UK and around the world, a manual search in the library and an electronic search through well-established legal and non-legal databases were carried out. Using domestic work, migrants and UK as search keywords, a huge volume of data was retrieved from Westlaw, Nexis Library, Ovid, CINAHL, HEIN ONLINE, and Sage Journals Online search engines. To streamline the data and make it more meaningful, the word ‘household’ was added to the search words, and the search result was restricted to cover a period of 11 years (2004 to 2014).<sup>1</sup> Notably, publications from sociology, geography, and migration disciplines dominated the literature, which has a few legal scholarly documents on domestic workers. In addition to the broad concern about shortfall in the legal protection of the ODWs, concepts such as vulnerable worker, precarious work, gendered migration, bonded labour, modern day slavery, and human rights abuse appear frequently in the literature. The availability of rich literature on the plights of ODWs undoubtedly showed this group of workers has caught the attention of many authors. It also shows the problems that they are facing in the UK and worldwide are real and worsening.

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<sup>1</sup> This is to ensure most recent data as well as some past but highly relevant information is gathered.

## 2.3 THE CONCEPT OF VULNERABILITY AND PRECARIOUSNESS

The words vulnerability and precariousness are used interchangeably in the literature even though they mean different things.<sup>2</sup> Whilst all precarious jobs might predispose workers to vulnerability, all vulnerable workers are not necessarily in precarious employment.<sup>3</sup> For simplicity, whilst vulnerability relates to workers, precariousness relates to work (Sargeant, 2009). Thus, a key feature that differentiates vulnerability and precariousness lies in the difference between ‘workers’ and ‘work’. On the face of it, far from being contemporary, the concepts of vulnerability and precariousness have been in existence since before the era of industrialisation (Quinlan, 2010). But, they took centre stage of the global economy in the 1970s (Szyszcak, 1987). Due to the impact on employers and employees alike (Almond and Kendall, 2001), the concept of vulnerability and precariousness have been receiving scholarly, political, media, and public attention for decades (Charmes, 2012; Dinkelman et al., 2012; Standing, 2009; Tokman, 2007). The impacts of globalisation and post-industrial employment problems<sup>4</sup> have possibly turned the concepts into a global topic. Globalisation and the expansion of the global economy, as characterised by a shift in the organisation of labour markets, has increased the demand for flexible employment (Fairey, 2005; Tucker, 2012). This increase, which has made the workers more vulnerable in the labour market (Olofsdotter, 2012), has also led to the emergence of job insecurity, low pay, occupational health and safety (“OHS”) risks, and wellbeing issues.<sup>5</sup>

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<sup>2</sup> For instance, vulnerability and precariousness are used in the following articles without a clear distinction: (1) Knight, A. (2014) *Disability as Vulnerability: Redistributing Precariousness in Democratic Ways*, The Journal of Politics 76(1), pp. 15-26; (2) Gibson, E (2014) *The Ethics of Vulnerability: A Feminist Analysis of Social Life and Practice*, New York: Routledge.

<sup>3</sup> See for instance Saunders, R (2003) *Defining Vulnerability in the Labour Market*, Research Paper W/21 Work Network, Canadian Policy Research Networks Inc., 2003

<sup>4</sup> See Centre for European Policy Studies (2007) *Is Social Europe Fit for Globalisation? A study on the social impact of globalisation in the European Union*, Brussels: European Commission, May 2007. See also Giuliano, B (2012) *The postindustrial employment problem and active labour market policy*, Paper prepared for presentation at the 10th ESPAnet annual conference, Edinburgh, 6-8 September 2012.

<sup>5</sup> See for instance, the Law Commission of Ontario (LCO) (2013), *The LCO’S Final Report on Vulnerable Workers & Precarious Work*, Institute for Work & Health Plenary, Ontario: LCO, November 26, 2013.

Explaining vulnerability and precariousness in the context of employment relationship, TUC (2008: 12) is of the view that vulnerable employment is “precarious work that places people at risk of continuing poverty and injustice resulting from an imbalance of power”. There is an inbuilt relationship of master and servant in every employment (Devitt, 2012). Employers as masters possess the power to employ and dismiss the employees while the employee’s main power is his/her job skills and experience in the relevant field. The extent to which the employee relies on his/her employer(s) could make the power imbalance between the parties more pronounced (Bewley & Forth, 2010). If the power relationship between the parties is balanced, neither party will suffer detriment (Martin, 1992).

The core argument on the plight of domestic workers is the assertion that they are vulnerable workers in precarious employment (ILO, 2010; Sargeant, 2014). On a general note, the group of vulnerable workers is extensive (Rogers, 2009; TUC, 2008). However, ODWs are believed to be the most vulnerable (CAB, 2004) because they experience a distinctly unique problem through their legal isolation and untenable immigration status. Most migrant workers, depending on their immigration status, are protected by law. But, ODWs are impliedly or exclusively excluded from many employment protections (ILO 2013). With less support from employment law and unfavourable immigration policies, ODWs are made subordinate to their employers because they heavily rely on them. Further, their continued invisibility to the public has made their vulnerability in the labour market highly significant (HRW, 2014).

## **2.4 EXPLAINING PRECARIOUS EMPLOYMENT**

There are two phases of precarious employment (O’Reilly et al., 2009: 1). The first phase that relates to the labour market problem of the 1980s and the unemployment that resulted from it, is believed to have led to the creation of nonstandard/atypical service sectors.

These sectors offer temporary and part-time jobs, give more flexibility to those who want it, and provide people (especially women) with the opportunity to combine housework with paid jobs. However, job flexibility comes with job uncertainty to the extent that precarious work is “unpredictable and risky” (Kalleberg, 2009: 2). Not surprisingly, precarious job “encompasses forms of work characterised by limited social benefits and statutory entitlements, job insecurity, low wages, and high risks of ill health” (O’Reilly et al., 2009: 5; Vosko, 2006: 11). The second phase of precarious job relates to globalisation, international migration, and the development of the concept of vulnerability. “Changes from standard, permanent employment relationships to nonstandard or precarious work arrangements have become the normative template in many work settings” (Vick and Lightman, 2010: 70). Workers’ vulnerability is complicated by job “instability, lack of protection, and insecurity” (Bhalla & Lapeyre, 1997: 428; Tompa et al., 2007: 209). Self-employment, part-time works, temporary work, long-hours, fixed-term work, and seasonal work predispose workers to economic vulnerability (Bewley & Forth, 2010; Pollert & Chalwood, 2009) and adverse occupational health and safety (Sargeant & Tucker, 2011; Underhill & Quinlan, 2011). Thus, the effect of precarious employment on workers includes health and safety risks and psychological problems. The assertion by the Law Commission of Ontario (2009) that precarious employment imposes real and significant costs on vulnerable employees, their households and the wider community, appears plausible because if an employee gets injured or becomes exposed to an infectious agent due the precarious nature of his/her job, Government departments such as the NHS and the Department of Work and Pensions might be dragged in to the problem. Underhill and Quinlan (2011: 398) have argued temporary and agency workers are more susceptible to sustaining injuries at work because they are “disproportionately employed in low-skilled and often hazardous occupations, low wages and lack of union membership,”



However, ODWs who lack Government support and protection appear to be in the worst position because they are prone to social, economic, and health hazards, and are more likely to lack capacity to control the situation. While some workers in the labour market are excessively privileged others, such as the ODWs, are “excessively exploited even to the point of death” (O’Reily et al., 2009: 2).

#### 2.4.1 THE INFORMAL SECTOR

Precarious employment as an informal economy (Solar et al., 2010) covers a wide range of business activities of the individual or family. This sector, which includes the black market, trafficking, and bonded labour allows employers to evade tax and state regulation and is believed to be thriving in the UK (Chant, 2002). “A job is informal when it lacks basic social or legal protections or employment benefits” (ILO, 2012: 27). Thus, the lack of/or inadequate legal protection for those who work in the household, clearly puts the ODWs amongst the group of the informal economy. The fact that the informal sector exposes workers to a high risk of exploitation, abuse, and occupational health and safety hazards (Clarke et al., 2007; Scott-Marshall & Tompa, 2011; Kim et al., 2008; Santiago & Carvalho, 2008; Underhill & Quinlan, 2011) could explain why domestic workers often suffer detriments. It is widely documented that most domestic workers often work without a day off, rest period, and paid holiday (HRW, 2014; ILO, 2013; Kalayaan, 2014). Another characteristic of the informal economy is the provision of jobs for those with irregular immigration status (WIEGO, 2014). There is evidence to suggest the households provide jobs for undocumented workers such as illegal immigrants or those who have overstayed their visas (Cuff et al., 2011; Van Hooren, 2010).

## 2.4.2 THE INSECURE SECTOR

Precarious employment is an insecure employment (Fournier, 2009) because any employment that offers a temporary contract is precarious employment (Connell and Burgess, 2006; Rotenberg et al., 2009; Vosko, 2010). The term ‘insecure’ depicts the ease at which a worker could lose his/her job (Kalleberg, 2009). Unlike the public sectors, those who work in private sectors are more likely to have a temporary contract and are more likely to lose their jobs (Heery and Salmon, 2002). The majority of ODWs are issued with temporary contracts, if any (Kalayaan 2014). The current ODWs visa regime that restricts the maximum length of residency of new domestic workers in private households to six months, further extends these workers’ job insecurity (HRW, 2014).

## 2.4.3 THE NON STANDARD SECTOR

Non-standard employment is precarious employment (Shire, 2012). This sector offers non-traditional job contracts such as casual, part-time, temporary or agency, contracted-out, posted, self-employed and undocumented work (Vives et al., 2011). Meanwhile, Cobble and Vosko (2000: 292) have argued “non-standard work is not new” but has always been part of the traditional job contract, of which little has been heard, since the recent rise in the informal sector economy that threatens the formal sector help shed more light on it. Unlike the insecure and informal sectors, non-standard sectors cut across all spectrums of the labour market and affect both the public and private sectors (OECD, 2014). Migrants, especially women, are more likely to work in the non-standard sector such as the household (ILO, 2010).

## 2.4.4 THE ATYPICAL SECTOR

One of the features of precarious employment is that it is atypical (Gumbrell-McCormick, 2011; Addison & Surfield, 2009). Atypical work refers to employment relationships, which do not conform to the standard or “typical” model of full-time, regular, open-ended

employment with a single employer over a long timespan (Eurofound, 2009). The Equality and Human Rights Commission (“EHRC”)<sup>6</sup> has argued atypical employment includes work performed by agency workers, the self-employed, temporary workers, and any other workers without permanent employment status. Given that the employment of domestic workers in households is mainly temporary and irregular (WEIGO, 2014), it could be argued that domestic work fits well into the atypical sector.

## **2.5 EXPLAINING VULNERABILITY IN THE LABOUR MARKET**

According to Gallagher, 1994: 187), “vulnerability at workplaces is difficult to define and subject to a broad interpretation from different professional perspectives”. The inherent problem in defining vulnerability is extensively discussed in the literature (Conway & Norton, 2002; Dunn et al., 2010; Pollert 2010, Sargeant & Tucker, 2010; TUC 2008, Weil, 2009). Fitzgerald (2010: 2) who has argued none of the definitions of vulnerability fully exhausts or explains what vulnerability is and/or what it is not, identified four problems hindering a proper definition of vulnerability:

- 1) The tendency to define vulnerability in terms of personal characteristics;
- 2) The concept of choice - If the definition omits the concept of choice, workers who would not regard themselves as vulnerable would appear in the same category as those who clearly are;
- 3) The role of employers - Imprecise definitions could cloud the role of employers in creating vulnerability as a deliberate strategy;
- 4) The general use of precarious work instead of vulnerable worker, and the tendency to omit or underplay the key feature of vulnerability such as the nature of the relationship of the worker to the labour market and their ability to work and earn income.

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<sup>6</sup> <http://www.equalityhumanrights.com/legal-and-policy/inquiries-and-assessments/inquiry-into-the-meat-and-poultry-processing-sectors/inquiry-terms-of-reference/> last accessed August 20, 2015

On the face of it, vulnerability is not a fixed or stable condition but a continuum (Bewley and Forth, 2010: 6). It is “a dynamic and relative concept that varies over time and across space and is not evenly distributed amongst all men and women” (Bonilla Garcia and Gruat, 2003: 6). Whilst Fussel (2007: 155) assertion that “the ordinary use of the word vulnerability refers to the capacity to be wounded” fails to provide a clear explanation of the concept of vulnerability, it provides an insight into the danger of being vulnerable and links health and safety issues with the concept of vulnerability. Nonetheless, the impact of vulnerability is more likely to be determined by the factor(s) that predispose workers to it.

## **2.6 THE CATEGORIES OF VULNERABILITY**

### **2.6.1 VULNERABILITY AS A LACK OF LEGAL PROTECTION**

Vulnerability can result from a disadvantage in legal protection and shortfall in employment rights (Leighton and Painter, 1987). The New South Wales mine safety advisory council (2015, no page) related that vulnerable workers are those “who may not receive equity, access, participation or rights to work and as a result face discrimination and an elevated health and safety risk”.<sup>7</sup> Although it is not uncommon for national laws to discriminate between migrant and non-migrant workers (Ruhs, 2010), where national laws protect migrant workers’ rights, some migrants may be ignorant of the law and/or their rights (BEER, 2008; Belin et al., 2011; Fevre et al., 2009; Fitzgerald et al., 2010). The ignorance of migrant workers might be due to various factors such as the language barrier (Sargeant and Tucker, 2010) and fear of the unknown. As Weil (2009: 413) puts it, “vulnerability in terms of employment security refers to the precarious nature of the employment relationship and increased risk of losing one’s job”. Thus, low-paid workers like the ODWs may feel powerless to assert their employment rights for fear of retribution (Pollert, 2010).

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<sup>7</sup> <http://www.dpi.nsw.gov.au/minerals/safety/world-leading-ohs/vulnerable-workers> last accessed August 30, 2015

## 2.6.2 VULNERABILITY AS A RISK

In the opinion of the United Nations (2001: 210), vulnerability is “a state of high exposure to certain risks, a reduced ability to protect oneself against these risks, as well as the ability to cope with their negative consequences”. The ability to protect oneself or the ability to cope with risks will determine how vulnerable the individual is in the labour market. On a general note, a worker may be susceptible to vulnerability, that is only significant, “if the employer exploits that vulnerability” (Hudson, 2006: 25). It follows that, without the employer abusing or exploiting the employee’s vulnerable position, the employee may not suffer any detriment in the workplace. Power imbalance is “inherent in employment relationship” (Pollett and Charlwood, 2009: 354). “[P]ower dependence, which originates from a sociological perspective approach and postulated by Martin (1977) and Bacharach and Lawler (1981), seeks to explain the distribution of power in terms of such patterns of interdependence between the parties” (Bewley and Forth, 2010: 4). As far as it is within the law, employers as fee payers have the power to determine employees’ salary, who can be employed and in what capacity. By contrast, employees’ power is restricted to their skills. An increase in the dependence of an employee on the employer would increase the employer’s absolute bargaining power (Martin, 1992: 26). As their dependence on their employer increases, employees may experience adverse treatment (Bewley & Forth, 2010) such as exploitation, abuse, discrimination and victimisation. The more vulnerable a person is, the greater his/her risk in the labour market is likely to be (Sargeant, 2009). Features such as characteristics of the employer, employee, and the job can affect balance of power in employment relationship and “make the adverse treatment of employees by their employers either more or less likely” (Bewley and Forth, 2010: 7). The poor socioeconomic background of most ODWs coupled with the precarious nature of their job and their invisibility to the public could increase their risk of vulnerability.

### 2.6.3 VULNERABILITY AS AN ABSENCE OF WORKERS UNION AND LOW PAY

Vulnerable workers are amongst “those who are in the bottom third of the hourly income distribution and who do not have their pay and work condition determined by a trade union” (TUC, 2006: 7). The low-paying sectors are “those industries or occupations with a large number of minimum wage workers or those in which a high proportion of jobs are paid at the minimum wage” (Low Pay Commission Report, 2010: 44). Although domestic work is generally categorised amongst the lowest paid jobs in the UK,<sup>8</sup> ODWs who are systematically excluded from the minimum wage are in the worst position. Given “someone who is earning below median pay and lacking collective voice” (Pollert, 2006: 6) is a vulnerable worker, it is understandable why ODWs are often referred to as vulnerable workers. Comparatively, non-unionised workers in the USA are faced with critical challenges and a very large growing proportion of the workforce has become vulnerable as a result of the precarious nature of their employment, “erosion of earnings potential, exposure to workplace hazards and social risks, or to a broader spectrum of social risks”.<sup>9</sup> “The USA has experienced a steady decline in private sector unionism over recent years, a situation that has increased the vulnerability of a large number of workers, many of whom are immigrants working in low-skilled, low-paid jobs with little or no protection” (Brunelle et al., 2011: 508). The UK Government policies on labour have so far failed to acknowledge the importance of workers union to the eradication of vulnerability at workplaces (Pollert, 2010). Although there is evidence of a domestic workers union in London,<sup>10</sup> generally, the lack of union prominence continues to predispose many domestic workers to vulnerability in the labour market.

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<sup>8</sup> Low Pay Commission Report 2012, *National Minimum Wage*, Cm 8302, London: TSO (The Statutory Office).

<sup>9</sup> Weil, D (2009) *Rethinking the Regulation of Vulnerable Work in the USA: A Sector-based Approach*, *Journal of Industrial Relations*, 51(3), p. 412

<sup>10</sup> See [www.j4dw.org](http://www.j4dw.org). last accessed August 25, 2015

## 2.6.4 VULNERABILITY AS SOCIAL EXCLUSION

There is evidence to suggest vulnerability could result from social exclusion.<sup>11</sup> This is partly because the concept of vulnerability in employment relates the risk of marginalisation from the labour market and social exclusion (Eurofound, 2002). “[T]he notion of social exclusion focuses on economic vulnerability, exposure to risk and uncertainty” (Whelan and Maitre, 2008: 637). “Socioeconomic vulnerability factors are those that relate to economic resources, the distribution of power, social institutions, cultural practices, and other characteristics of social groups typically investigated by the social sciences and the humanities” (Fussel, 2007: 158). Thus, social exclusion is a disadvantage resulting from precarious jobs, unemployment, cultural alienation, immigration constraints, and weakening of familial networks (Lombe and Sherraden, 2008). Contrary to the assertion that inequalities created by vulnerability are the major cause of social exclusion, Brown (2011) has argued that vulnerability is in itself damaging to the pursuit of social justice because it is loaded with political, moral and practical implications. The ODWs are socially excluded because their long working hours and the hidden nature of their workplaces make them invisible to the public. The impact of issues relating to employment rights on workers varies, and so is their impact on the individual working life.<sup>12</sup> Common problems of vulnerability such as unfair dismissal, non-payment of wages, and unlawful deduction in wages are the type of problems faced by most ODWs in the UK (Anderson, 2007).

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<sup>11</sup> See Bingqin, L (2005) *Urban Social Change in Transitional China: A Perspective of Social Exclusion and Vulnerability*, Journal of Contingencies and Crisis Management, 13(2), pp 54-65. See also Whelan, C. and Maître, B. (2005) *Vulnerability and multiple deprivation perspectives on economic exclusion in Europe: A latent class analysis*, European Societies; 7(3), pp. 423 – 450.

<sup>12</sup> See Shearn, K; Knight, B; Matharoo, A.K (2010) *Evaluation of the Vulnerable Worker Pilots Year 2 (Final) report*, Employment Relations Research Series, No. 108, London: Department of Business, Innovation and Skills.

## **2.7 PICTURING THE VULNERABLE WORKERS**

The Trades Union Congress(“TUC” 2006) estimated one in five employees or around 5.3 million workers in the UK are vulnerable to exploitation in the labour market. Although a subsequent report by Pollert & Charlwood (2009: 345) estimated the number of vulnerable workers in the UK was 2 million, the incongruity in the figures is not as important as the indication that vulnerability at workplaces is real and the number of workers affected by it is significant. On the face of it, all workers irrespective of the sector in which they are employed are potentially vulnerable one way or the other. It is thus not surprising that the list of vulnerable workers is endless. Some of the vulnerable workers identified in the literature include:

- 1) Child labourers and home workers (Leighton and Painter, 1987)
- 2) Younger and older workers, part-time workers, those without a human resource department in their workplace or company, those who do not have managerial/supervisory duties, and lower fee earners (Croucher and White, 2007: 151)
- 3) Ethnic minority groups, female workers, disabled workers, agency workers, migrant workers, informal workers and those without any education or training qualifications (TUC, 2006)
- 4) Irregular migrants and residents, victims of trafficking (especially working in the sex industry), ODWs, posted workers, migrant workers employed by gangmasters and temporary work agencies (Smeaton et al., 2010: 137)
- 5) Textile and footwear, security, hairdressing, residential care, retail, cleaning, agriculture, hospitality and social care (Hudson, 2006: 6)
- 6) Those who work in hotels, care homes, restaurants, and construction industries (Pollert and Charlwood, 2009)
- 7) Those who are at risk of having their workplace entitlements denied and who lack the capacity or means to secure them (HSE, 2012)



- 8) Those who are engaged in the private and diplomatic households (Anderson, 2010; ILO, 2003, Lutz, 2008; Oxfam and Kalayaan 2008, Sargeant, 2014).

To determine which of the above groups is the most vulnerable, it is necessary to consider the factors of vulnerability such as poor socioeconomic background or economic disadvantage (Phillip and Rayhan, 2004), gender (Jayaweera et al., 2008), and immigration status (Wright et al, 2007). It will also be helpful to consider factors of precariousness such as occupational health and safety condition (Sargeant and Tucker, 2010), the type of work, and work environment (HRW, 2014), as well as any history of exploitation and abuses (Kalayaan, 2014).

Having considered the above factors, one may conclude that migrant workers appear to be more vulnerable than non migrants workers (Boocock et al., 2011; CAB, 2004; IPPR, 2007; McKay and Winkelmann-Gleed, 2005; O'Connell and McGinnity, 2008; Rogers et al., 2009; Simon et al., 2014). A worker' nationality could determine the chance that he/she would take on precarious employment (Sargeant and Tucker 2010). Migrant workers who are frequently in temporary positions are more vulnerable to financial hardship, especially in the era of economic downturn (Hudson and Radu, 2011: 5). Migrant workers who often end up in insecure, hyper-flexible and non-standard or atypical employment relations (Anderson, 2007) are often not aware of their employment rights. As a result, they may be prepared to work where the working conditions are particularly hard and dangerous (Belin et al., 2011). For migrants, communication and language barrier may be a key issue to settlement in the host country, and can increase the risk of occupational health and safety hazard (Sargeant and Tucker, 2010) as a result of poor knowledge and/or the inability to understand health and safety rules. Further, due to poor socioeconomic background and/or eagerness for work, "some migrants may be prepared to take on jobs at wages and conditions that many UK nationals will not consider appropriate" (Anderson 2010: 311).

In the UK, there is evidence to suggest migrant workers face problems of exploitation by their employers, and retribution by politicians and members of public who see them as job grabbers (Morgan and Finnear, 2009). Migrants are also at risk of exploitation and abuses by organised criminals, especially where they are undocumented and the law does not protect them (Grant, 2005). According to European Agency for Safety and Health at Work (EU-OHSA, 2008), a study in nine largest economies of the former EU15, shows between 4.4 and 5.5 million immigrants are vulnerable because of their engagement in the informal economy. The vulnerability of those who engage in informal economy could increase if they do so illegally (Anderson, 2010). Nonetheless, of the group of migrant workers, ODWs who are mainly women (ILO, 2009), often excluded from the host country's national laws that protect workers (HRW, 2014; ILO, 2013), and invisible to the public (Kalayaan, 2014) are considered the most vulnerable.

### 2.7.1 OVERSEAS DOMESTIC WORKERS AS VULNERABLE WORKERS

Domestic workers are prone to a series of abuse and exploitation and they could “experience a degree of vulnerability that is unparalleled to that of other workers” (Blackett, 1998: 5). Despite an increase in scholarly and NGOs' publications, as well as the steady media coverage <sup>13</sup> of the plights of the ODWs, the Government appears to have little support for them (Albin and Mantovalou, 2012; HRW, 2014; Kalayaan, 2014). Due to the failure of most European States to recognise domestic work as a real work (Anderson 2000) and the attribution of a low value to their work (Lutz, 2008), ODWs continue to lack respect and/or support.

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<sup>13</sup> See (1) BBC Radio 4 – File on 4, Domestic Servitude, 27 June 2010. [www.bbc.co.uk/programmes/b00srp6v](http://www.bbc.co.uk/programmes/b00srp6v) last accessed January 5, 2015; (2) H. Khaleeli, *How domestic workers become slaves*, The Guardian 6 August 2010, <http://www.guardian.co.uk/lifeandstyle/2010/aug/06/domestic-workers-slaves> last accessed July 30, 2015; (3) A. Fishburn & H. Garlick, *ODWs: 'I was in a prison, a cage, just like a slave'* The Times, January 21, 2010 [http://women.timesonline.co.uk/tol/life\\_and\\_style/women/the\\_way\\_we\\_live/article6995570.ece](http://women.timesonline.co.uk/tol/life_and_style/women/the_way_we_live/article6995570.ece) last accessed July 30, 2015

Very little or no attention is focused on ODWs' economic importance (Anderson, 2001) because they do not feature amongst the list of workers that contribute to the country's GDP. Legally admitted ODWs are likely to pay tax and spend part of their money in the host country thereby, in a way, contributing positively to the economy. More importantly, the fact that ODWs take on the role that is highly unlikely to be occupied by British and/or EU workers<sup>14</sup> strengthens the argument that they are economically relevant. Whilst the Government as an entity may have shown little support for the ODWs, the fact that domestic workers problem continue to make headline in Parliamentary debates (Gower, 2012) is evident that some politicians have realised the need to support these workers. In a 2011 report titled 'Service not servitude: protecting the rights of domestic workers',<sup>15</sup> Fiona MacTaggart MP and Matthew Lawrence criticised the Government policy on ODWs and advocated for more protection for the workers. One of the Government failures to protect ODWs that the report identified is the non implementation of the ILO convention 189. In a House of Lords debate that centred on the plight of ODWs in the UK, Baroness Cox stated:

My Lords, I am very grateful to all noble Lords speaking in this debate today on a subject that demands our attention both for the heart-rending predicament of many domestic migrant workers and for the urgent need for action to remedy the situation, which renders them vulnerable to exploitation and abuse.<sup>16</sup>

A few days after the House of Lords debate, on 16<sup>th</sup> June 2011, the ILC adopted convention 189 and it's accompanying Recommendation with few abstentions.<sup>17</sup> The UK is one of the countries that abstained from the vote.

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<sup>14</sup> See for instance, the International Organisation for Migration, *World Migration 2005: Costs and Benefits of International Migration*, Geneva: IOM 2005. See also R. Münz, T. Straubhaar, F.P. Vadean, N. Vadean, *What are the migrants' contributions to employment and growth? A European approach*, Research Report, HWWI Policy Paper, 2007, No. 3-3, pp. 5-7

<sup>15</sup> <http://iwc2.labouronline.org/168807/uploads/d1b4992c-e69e-3784-b9c2-8c43818fbd3d.pdf> last accessed August 21, 2015

<sup>16</sup> Baroness Cox, ODWs - *Question for Short Debate*, Wednesday, 8 Jun 2011 : Column GC42 (Grand Committee),

<sup>17</sup> [http://www.ilo.org/global/about-the-ilo/press-and-media-centre/videos/events-coverage/WCMS\\_157933/lang-en/index.htm](http://www.ilo.org/global/about-the-ilo/press-and-media-centre/videos/events-coverage/WCMS_157933/lang-en/index.htm) last August 25, 2015

The Government position is that existing UK laws protect domestic workers; hence, there is no need to implement additional measures (Kalayaan, 2012). Yet, a closer look at the Government immigration policy and employment law clearly show ODWs have the strictest visa regime and are excluded from minimum wage and working time protection (HRW, 2014). The UK that has once been praised for its immigration policy on ODWs since 1998 (HRW, 2001: 39), missed the opportunity to convince the world that it is committed to protecting the rights of vulnerable workers, such as ODWs.

## **2.8 THE INTERNATIONAL COMMUNITY ON DOMESTIC WORKERS**

The plights of ODWs from historical and legal perspectives are internationally recognised.<sup>18</sup> However, the setback for ODWs lies in the lack of agreement on how best to deal with their problems. The United Nations (“UN”) takes a special interest in the human rights of all workers whilst one of its specialised agencies, the ILO continue to find a lasting solution to the dilemmas of domestic workers around the world. In the guise of harmonizing labour laws across the world, various international authoritative instruments have been directed at setting labour standards and monitoring its implementation. However, domestic workers around the world continued to be unfairly excluded from laws that favours the other professionals (ILO, 2013). In June 2011, an international labour standard aimed at combating the shortcomings in the signatory States’ laws and policies on the protection of the domestic workers was adopted by the 100<sup>th</sup> Session of international labour conference.<sup>19</sup> The framework has been implemented by several countries including Germany and Italy but, the UK has so far refused to recognise it (HRW, 2014).

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<sup>18</sup> See for instance, ILO – *Domestic workers across the world: global and regional statistics and the extent of legal protection* / International Labour Office – Geneva: ILO, 2013

<sup>19</sup> ILO – Decent Work for Domestic Workers, Convention 189 & Recommendation 201 at a glance, Geneva: ILO. Available in pdf [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_170438.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_170438.pdf). Last accessed July 31, 2015

## 2.8.1 THE UNITED NATIONS ON DOMESTIC WORKERS

Founded in 1945, the UN is committed amongst other things to promoting social progress, better living standards, and human rights for all. It is clear from its founding Charter<sup>20</sup> that the international organisation is capable of taking action on a wide range of issues relating to the protection fundamental human rights and the elimination of discrimination.<sup>21</sup> The UN clarified that the rights contained in all its instruments apply to every individual living within the member States' territory irrespective of nationality, immigration status, and employability.<sup>22</sup> Further, the Committee on the Elimination of Racial Discrimination (CERD) stresses that the convention on the elimination of all forms of racial discrimination must be construed so as to avoid undermining the basic prohibition of discrimination and in a way that allows even non-citizens to enjoy equal protection and recognition before the law (UNHCR, 2004). The concerns of the UN probably originate from the acknowledgement of an increasing international migration facilitated by globalisation, the quest for work, better lives, and a safe haven. The UN interests in international migration are further demonstrated in one of its publications that address the plights of migrant workers and their families who were deemed to be in need of further protection in the host nations.<sup>23</sup> Article 2 (1) of the resolution defines a migrant worker as ‘‘a person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’’.

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<sup>20</sup> United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI.

<sup>21</sup> See for instance: (1) United Nations General Assembly, *Universal Declaration of Human Rights*, Resolution 217A (III), 10 December 1948; (2) United Nations General Assembly, *The Convention on the Elimination of All Forms of Racial Discrimination*, Resolution 2106A (XX), 21 December 1965; (3) United Nations General Assembly, *The International Covenant on Civil and Political Rights*, Resolution 2200 [XXVI], 16 December 1966 (ICCPR, 1966); (4) United Nations General Assembly, *The Convention on the Elimination of All Forms of Discrimination against Women*, Resolution 34/180, 18 December 1979; (5) United Nations General Assembly, *The Convention against Torture, and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Resolution 39/46, 10 December 1984.

<sup>22</sup> Office of the United Nations High Commissioner for Human Rights, ICCPR General Comment No. 15: *The position of aliens under the Covenant*: 11/04/1986, Twenty-seventh session, 1996-2001, Geneva: Switzerland

<sup>23</sup> United Nations General Assembly *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, Resolution 45/158, 18 December 1990

It is clear from Article 1(1) of the resolution that the benefits intended by the resolution applies to all migrant workers irrespective of who they are and whether or not they are in active, passive or no employment. It literally follows that, if domestic workers are engaged in remunerated activities, which quite clearly they are (except if enslaved), they must be seen as a group that is entitled to the benefits of the resolution.<sup>24</sup>

The Committee on the Protection of the Rights of all Migrant Workers and Members of Their Families (CMW), which is tasked with the monitoring and implementation of the resolution, is of the opinion that member States often misconstrue the resolution not to include migrant domestic workers. Whilst the word migrant is clear enough to depict someone who has no nationality of the country where he or she is residing, there are various activities, which could constitute domestic work.<sup>25</sup> Besides, some domestic workers work in the public sector, whilst others are engaged in the private sector (including households). These characteristics of migrant domestic workers could explain why it is difficult to define domestic workers. The CMW argued migrants, especially women who continue to dominate the domestic work industry are not well protected by both national laws. Furthermore, CMW is of the view that despite all the international initiatives aimed at eradicating all forms of discrimination and promoting equality and human dignity, most member States are yet to seize the initiative to improve their effort to protect migrant women especially. Concerned about the plights of domestic workers worldwide, the CMW clarified that except for those groups of workers excluded under Article 3 of the resolution, the resolution must be construed to include domestic workers.<sup>26</sup>

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<sup>24</sup> Some countries do not recognise domestic workers in the private households as workers, and where they are so recognised, the law often exclude them from the protection enjoyed by other workers.

<sup>25</sup> See for instance, ILO: *International Standard Classification of Occupations*, 1988, Geneva, 1990, pp 146 - 148, 153, 161, 255

<sup>26</sup> United Nations, *International Convention on the Protection of the Rights of All Migrant Workers and Their Families*, CMW/C/GC/1, United Nations 23 February 2011.

It is clear from Article 1(3) of the UN Charter <sup>27</sup> that the organisation is committed beside achieving an international cooperation in solving international problems of an economic, social, cultural, or humanitarian character to promoting and encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion. The international body takes discrimination, in particular against women, more seriously because it goes against its core principle. The lack of legal protection, immigration policy, the nature of the household as an isolated workplace, over dependence on employers, language barrier, lack of familiarity with the host' culture, and the employment practices restricting the employees' freedom have also been identified by the CMW as part of the features that render the ODWs vulnerable.

This vulnerability is aggravated where the worker is undocumented or illegally residing in the host country. Amongst the employment practices the CMW believed are causing adverse effects on ODWs are: retention of their passport by the employers, abusive working conditions such as the restriction of movement outside the house, restriction on communication, excessive and undefined working hours, insufficient rest and leisure time, low wages, lack of social security protection, abuse and harassment, as well as inadequate and degrading living conditions. CMW advocated for the protection for both documented and undocumented workers alike. The European Union Agency for Fundamental Rights (EUaFR) that examined the treatment of migrant domestic workers in 10 of the European Union 27 member States, also stressed the need to protect legal and illegal workers alike. <sup>28</sup> The EUaFR conducted research with largely female migrant workers <sup>29</sup> and civil society organisations in 10 of the 27 EU member States.

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<sup>27</sup> The United Nations, *Charter of the United Nations*, 24 October 1945, 1 UNTS XVI

<sup>28</sup> European Union Agency For Fundamental Rights (EUaFR), *Migrants in an irregular situation employed in domestic work: Fundamental rights challenges for the European Union and its Member States*, Luxembourg: Publications Office of the European Union, 2011

<sup>29</sup> The word migrant in this context describes third-country nationals who are staying in the EU in an irregular manner because they no longer have valid residence permit.

The research in Belgium, France, Germany, Greece, Hungary, Ireland, Italy, Poland, Spain and Sweden examined how member States have implemented and/or translated the rights contained within the UN Declaration on Human Rights, namely: the respect for private and family life (Article 7), freedom of assembly and of association (Article 12), protection in the event of unjustified dismissal (Article 30), fair and just working conditions (Article 31), family and professional life (Article 33), and the right to an effective remedy (Article 47). The EUaFR found the risk of violation of rights is exacerbated for workers who do not have the right to stay in the host country (otherwise illegal immigrants/workers). EUaFR also found the protection of rights of migrant domestic workers, especially in irregular situations varies across the 10 countries and that employers largely determine access to fundamental rights. As such, EUaFR advocated more States efforts to promote migrant' rights awareness. Domestic work in most of the EU States is often performed by women with irregular immigration status and this status predisposes them to systemic abuse and exploitation to which they are unable to challenge (Schwenken, 2005). Schwenken argued that the EU policies on irregular migrants discriminated on women and the link between migration and security policies in EU member States often means that this group of workers are treated under the criminal law and not as a victims of the immigration law. Further, the Committee on the Elimination of Discrimination against Women (CEDAW), a UN body of independent experts that monitors the implementation of the Convention on the Elimination of All forms of Discrimination against Women stated that the elimination of discrimination against women includes the elimination of all sex and gender based discrimination, and suggested:

any distinction, exclusion or restriction made on the basis of sex, which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other fields.<sup>30</sup>

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<sup>30</sup> Convention on the Elimination of all Forms of Discrimination Against Women, United Nation General Assembly Resolution 34/180, 18 December 1979



CEDAW identified three categories of migrant women that need legal protection as those: (a) who migrate independently, (b) who join their spouses or other members of their families who are also workers, (c) undocumented women migrant workers. CEDAW argued although migration could present new opportunities for women in terms of economic empowerment, it also placed their human rights and security at risk. But, to restrict or prohibit women from migrating would in itself be discriminatory. Thus, signatory States are obliged “to respect, protect and fulfil the human rights of women migrant workers, alongside the legal obligations contained in other treaties, the commitments made under the plans of action of world conferences and the important work of migration-focused treaty bodies, especially the Committee on the Protection of the Rights of All Migrant Workers and Members of their Families’”.<sup>31</sup>

The United Nations Development Fund for Women (“UNIFEM”, 2003) argued globalisation ushered an increasing migration of labour, but it has also resulted in increased de-regulation of the labour market, growth in the informal sector, and the emergence of new forms of exploitation. UNIFEM concerns itself with the plights of women in the domestic work industries, especially those that work and live with their employers. The concern relates to the experience of this group of workers of exploitation, discrimination (gender, racial, ethnic, and religious) and abuse by their employers. According to UNIFEM, women migrants are often restricted from joining worker’s unions, locked in the home (restriction of movement), often made to work in dangerous and degrading conditions without any care for their health and safety, and are more likely to experience mild rejection, an outright social exclusion, overt racist and xenophobic attitudes in public settings and in the media. Nevertheless, UNIFEM’ campaigns for the protection of women migrants is not a campaign on the right to migrate, but the need to eradicate gender-based discrimination.

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<sup>31</sup> Committee on the Elimination of Discrimination against Women, general recommendation No. 26 (2008) on women migrant workers, CEDAW/C/2009/WP.1/R, para. 5.

Migration is a very sensitive matter politically, socially, economically and demographically (Saggar et al., 2012). The effect of migration on the host nations could sometimes be over-exaggerated by migration sceptics and the media (Martell, 2010; Shah, 2008). A recent migration report in the USA suggests “there has been no significant growth in the unauthorised population in the USA since 2006”.<sup>32</sup> This is contrary to the public assumption of an increase in the number of immigrants. Similarly, in the UK, there is evidence to suggest net migration is reducing.<sup>33</sup> In 2005, the UN General Assembly reiterated that as part of its efforts to achieve the ‘Millennium Development Goals’ of reducing poverty, it strongly supports full and productive employment and decent work for all, including women and young people.<sup>34</sup> Decent work means productive work for women and men in conditions of freedom, equity, security and human dignity.

The idea of decent work is based on four distinct pillars namely: employment creation and enterprise development; social protection; standards and rights at work; governance and social dialogue.<sup>35</sup> According to ILO (2010), decent work involves opportunities for work that are productive (such as domestic worker) and delivers a fair income; provides security in the workplace and social protection for workers and their families; offers better prospects for personal development and encourages social integration; gives people the freedom to express their concerns, to organise and to participate in decisions that affect their lives; and guarantees equal opportunities and equal treatment for all. ILO (2012) is of the view that the best way to achieve a decent work for both men and women domestic workers alike is to bridge the standard gap. This will involve the official recognition of domestic work as work and the regulation of the rights and duties of these workers and their employers.

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<sup>32</sup> Papademetriou, Demetrios G. and Aaron Terrazas, 2009, *Immigrants and the Current Economic Crisis Research Evidence*, Policy Challenges, and Washington, D.C: Migration Policy Institute, 2009

<sup>33</sup> ONS – *Migration Statistics Quarterly Report*, Statistical Bulletin, February 2014 | 27 February 2014

<sup>34</sup> See United Nations General Assembly, World Summit Outcome, Resolution A/RES/60/1, 16 September 2005

<sup>35</sup> ILO: *Toolkit for mainstreaming employment and decent work/United Nations System Chief Executives Board for Coordination*, Geneva: International Labour Office, 2007, p. vi.

## 2.8.2 THE ILO ON DOMESTIC WORKERS

The ILO is a tripartite (representatives of Governments, employers and workers) agency charged with formulating, drafting and shaping employment policies and programmes capable of setting genuine international labour standards. Thus, the ILO looks into employment laws, job crisis, social protection, social Justice and fairness. Using its knowledge of employment and work condition, the ILO is competent to address the plights of migrant domestic workers around the world, and has been doing so since the 1936. Concerned that Convention (No. 52),<sup>36</sup> adopted by the International Labour Conference gives workers in manufacturing, and a range of other industries, the right to six days of paid leave, but excludes domestic workers, the ILO advocated for the need to include this group of workers in all the labour standard instruments. The first resolution addressing the condition of employment of domestic workers was submitted by a workers' delegate of the United Kingdom in 1948, Mr Roberts.<sup>37</sup> More than half a century past, domestic workers worldwide continue to experience negative treatment. A significant number of ILO signatory States in both developed and developing world have not enacted measures to protect domestic workers (ILO, 2013). An ILO (1995) report found migrant domestic workers are often excluded from the right to form trade unions<sup>38</sup> that the ILO considered important because it allows the workers to speak and negotiate with one voice, reflects the values in democratic and fair society, and endorses general application of the rule of law. Recognising this fact, the ILO (1965) made a further call to signatory States to take active actions to enact measures that are friendlier towards domestic workers.

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<sup>36</sup> ILO: *Resolution concerning Holidays with Pay for Domestic Servants, submitted by the Committee on Holidays with Pay*, International Labour Conference, 20th Session (Geneva, 4–24 June 1936)

<sup>37</sup> ILO: *Record of Proceedings, International Labour Conference (ILC)*, 31st Session, 1948, Appendix XVIII: Resolutions adopted by the Conference, pp. 545–546.

<sup>38</sup> ILO: *Report of the Committee of Experts on the Application of Conventions and Recommendations*, International Labour Convention, 82nd Session, Report III (Part 4A), 1995, para. 59.

The exclusion of domestic workers from protection under the national laws and employment standards, such as the contract of employment, remuneration, pregnancy and maternity leave, working hours and the live-in relationship was addressed at the 87<sup>th</sup> Session of the ILC.<sup>39</sup> The Convention stressed that maternity protection for women at work is a key area of interest to the ILO and that a failure to protect pregnant women at work could constitute a discrimination against women. According to Blackett<sup>40</sup> the private nature of migrant domestic workers' workplaces makes them invisible to the law and policy makers and the public. This isolation could explain why the problems of this group of workers are so unique comparing to the experience of other migrant workers who are visible to the public. Shedding some light on the working conditions of domestic workers around the world beyond the invisibility factor, the ILO states low social status is another factor that predisposes domestic workers to vulnerability, labour exploitation and abuses. Domestic workers do not enjoy the same legal rights as other workers; they often work in informal sectors and are readily undervalued. According to the ILO (2013), the key reason domestic workers are not protected by law is that in most countries, labour law considered domestic work as aspects alien to it because it falls within the family sphere. An ILO (2013) study of national law around the world found very few countries have enacted laws aiming at recognising domestic work as employment. Thus, most national laws fail to provide holistic protection for domestic workers. The ILO is concerned signatory States often do not have legal rules protecting domestic workers' working hours, entitlement to national minimum wage, and the right to take maternity leave.

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<sup>39</sup> International Labour Conference, 87th Session 1999, Report V(1), *Maternity protection at work, Revision of the Maternity Protection Convention (Revised)*, 1952 (No. 103), and Recommendation, 1952 (No. 95), Fifth item on the agenda, Geneva: International Labour Office.

<sup>40</sup> Blackett, A.: *Making domestic work visible: The case for specific regulation*, *Labour Law and Labour Relations Programme*, Working Paper No. 2, Geneva: ILO. 1998.

Considering that the overwhelming majority of domestic workers are women (ILO, 2009), the right to maternity protection should be available to this group of workers and or eligibility criteria should be relaxed to allow women domestic workers, access to social benefits. Determined to ensure the enactment and implementation of a sound international employment standard for all workers, the ILO adopted a declaration of the principles and rights at work at the International Labour Conference in June 1998.<sup>41</sup> The declaration contained a repeat of the four fundamental principles stressed in the previous publications, namely: the prohibition of unfair discrimination, right of free association and collective bargaining, freedom from forced labour; and the eradication of child labour. A Special Action Programme to Combat Forced Labour (SAP-FL) was created in 2001 to monitor and raise awareness of forced labour. According to ILO, “the term forced or compulsory labour shall mean all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily”.<sup>42</sup> The ILO classified forced labour as that imposed: (1) by the State as a penalty, (2) through sexual exploitation, and (3) through labour exploitation.<sup>43</sup> In 2005, the ILO estimated about 12.3 million people around the world are in forced labour.<sup>44</sup> The figure was escalated to around 20.9 million in 2012.<sup>45</sup> The highest proportion of those in forced labour are those who have been trafficked for labour exploitation (see fig. 25).

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<sup>41</sup> ILO: *Declaration on Fundamental Principles and Rights at Work and its Follow-up*, International Labour Conference, 86th Session, 18 June 1998 (Annex revised 15 June 2010) Geneva: International Labour Organisation, June 1998

<sup>42</sup> ILO: C029 - *Forced Labour Convention, 1930 (No. 29)*, Convention concerning Forced or Compulsory Labour (01 May 1932), Geneva: ILO

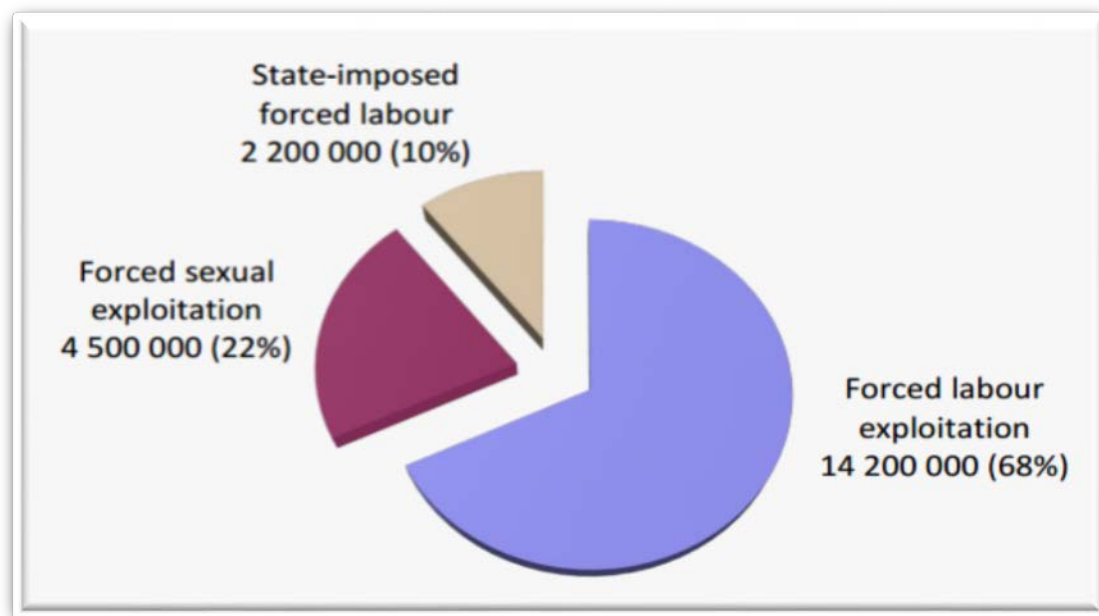
<sup>43</sup> See Kanchana N. Ruwanpura and Pallavi Rai (2004) *WP 18-Forced Labour: Definition, Indicators and Measurement*, DECLARATION/WP/18/2004, Geneva: ILO

<sup>44</sup> ILO: *A Global Alliance against Forced Labour, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work*, Geneva, 2005; Belser, de Cock, Mehran: *ILO Minimum Estimate of Forced Labour in the World*, ILO, Geneva, 2005.

<sup>45</sup> ILO: *Global estimate of forced labour: results and methodology / International Labour Office, Special Action Programme to Combat Forced Labour (SAP-FL)*. - Geneva: ILO, 2012

Considering that since the 1948, the UN has adopted the international bill of rights<sup>46</sup> as a common standard of achievement for all peoples and all nations, it is worrying that the majority of rights contained therein are still being systematically abused and people are not being treated equally contrary to the aim of the declaration.

**FIGURE 3: GLOBAL ESTIMATE BY FORM OF FORCED LABOUR**



Source: ILO Global Estimate of Forced Labour 2012

According to Article 2 of the declaration, everyone is entitled to all the rights and freedoms without distinction of any kind. Article 4 prohibits holding anyone in slavery or servitude condition, whilst Article 5 forbids the subjection of people to torture or to cruel, inhuman or degrading treatment. The various report of the ILO point to the fact that some if not most domestic workers are made to work in servitude condition. In addition, the condition in which most live-in domestic workers are subjected could be regarded as inhuman and degrading. The fact that most national laws ignore these systemic abuses is a concern to the international organisation.

<sup>46</sup> United Nations General Assembly, *Universal Declaration of Human Rights*, Resolution 217A (III), 10 December 1948

Further, the States' shortcoming offends Article 7, which states that is equal before the law and are entitled without any discrimination to equal protection of the law. International jurisprudence has been pro-active in asserting the intention of the international community in riding out exploitation and forced labour. In *Siliadin v. France*,<sup>47</sup> the European Court of Human Rights in Strasbourg examines an application by Siwa-Akofa Siliadin, a Togolese national who was fifteen and a half years old when a French national of Togolese origin took her to France. She agreed to assist her host with housework in return for, which the host would regularise her immigration status and arrange for her education. Her immigration status was never regularised, she worked as unpaid servant to her host/employer, and had her passport was confiscated. The Court held she had not been enslaved because her employer had "no genuine right of legal ownership over her". However, the court ruled that she was held in servitude condition contrary to Article 4. This case shows how difficult it is to show that a particular condition amounts to slavery. Similarly, in *C.N. and V. v. France*,<sup>48</sup> two orphaned Burundi sisters aged 16 and ten years complained they were kept in domestic servitude, forced, or compulsory labour (unremunerated domestic chores in their aunt and uncle's home). The court held their activities within the household would have been described as work if performed by a remunerated professional, and that forcing them to work under the threat of being returned to Burundi is a cohesion, which amounts to servitude contrary to article 4. In *C.N. v. the United Kingdom*,<sup>49</sup> the court found in favour of the applicant, a Ugandan woman who has complained that she had been forced into working as a live-in carer, and subjected to domestic servitude by her employer in violation of her Article 4 right. The court held there is a lack of specific legislation criminalising domestic servitude in the UK and this made investigation into victim's allegations ineffective.

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<sup>47</sup> *Siliadin v. France* (application no. 73316/01), European Court of Human Right, no. 415, 26.7.2005

<sup>48</sup> *C.N. and V. v. France* (no. 67724/09) ECHR 374 (2012) 11.10.2012

<sup>49</sup> *C.N. v. the United Kingdom* (no. 4239/08) ECHR 414 (2012) 13.11.2012

Apparently, the decision led to the UK Parliament enactment of section 71 of the Coroners and Justice Act 2009, which creates specific offences of slavery, servitude and forced or compulsory labour. In another case, *Elizabeth Kawogo v. the United Kingdom* (no. 56921/09) communicated to the UK Government in June 2010, the applicant, a Tanzanian national who arrived in the UK on a domestic worker visa valid until November 2006 averred that she was made to work daily for the parents of her previous employer, from 7 a.m. till 10.30 p.m., without payment, for several months. She was forced to continue working even at the expiry of her visa until she was able to escape in June 2007. She complained to the court that the treatment of her by the employer amounted to forced labour in breach of her Article 4, and that she had been unable to access justice in the UK. Before the Fourth chamber of the court could decide the case, the UK Government, in what could be interpreted as an acceptance of failure, reached an out of court settlement with the applicant. Through its wide network, the ILO became aware of the continued lack of legal protection for domestic workers in general but, migrant domestic workers in particular.<sup>50</sup> Even where national laws purport to protect this group of workers, the State competent agencies are either reluctant or lack the facility and/or capacity to enforce the law. Having identified the migration factor of vulnerability, the ILO (2006, 2007, and 2009) recognises that labour migration, especially cross-border migration in the era of globalisation and its consequences continues to attract both local and international attention. The dilemma between migration and achieving a fair deal for migrant workers was in focus at the 2004 labour conference, which specifically mentioned the plight of women domestic workers as the most vulnerable group of workers at paragraph 187. The talk about migration is not based on labour migration being a contemporary issue but on the contemporary problems of labour migration.

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<sup>50</sup> Ramirez-Machado, J.M. *Domestic Work, Conditions of Work and Employment: A legal perspective*. Conditions of Work and Employment Series No. 7, Geneva: International Labour Office. 2003



“People, in their search of a decent work and security are creating new waves of challenge to policy-makers who have to find a better way of managing their flow in the interest of protecting human rights, maximizing migration’s contributions to growth and development, and preventing clandestine flows and trafficking”.<sup>51</sup> Migrants, especially those from the developing countries, who are mainly “women moving from poorer to richer countries for economic reasons”,<sup>52</sup> leave their children and family behind to engage in jobs often described as 3Ds (dirty, dangerous, and difficult), which national workers<sup>53</sup> and those with settled status are unlikely to accept (Anderson, 2001). Cross border migration does have its pros and cons. As ILO (2004) argues, international migration affects, sometimes adversely, on the migrants and host nations’ economy, national security, demography and population. This perspective is better represented in the ILO (2014) publication where it is argued that migration is beneficial to migrants and the host nations but, migration must be controlled in such a way to make migration workable because irregular and or undocumented migration often poses greater risks not only to the migrants but also to policy-makers and the public. Migrant workers tend to be engaged in high-risk sectors, which expose them to sub-standard or inhumane working conditions; whereby making them vulnerable to the risk of hazards and or work related diseases (Barrett and Sargeant, 2012). Further, migrant workers often experience communication difficulties due to language and cultural barriers. Considering that most national laws differentiate between those who are legally residing (and allowed to work) in the country and those who are illegal or undocumented (often subjected to criminal law) (HRW, 2014).

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<sup>51</sup> ILO: *Towards a fair deal for migrant workers in the global economy*, Report VI, 92nd Session of the International Labour Conference, Geneva, June 2004, p.1

<sup>52</sup> ILO: *Towards a fair deal for migrant workers in the global economy*, Report VI, 92nd Session of the International Labour Conference, Geneva, June 2004.

<sup>53</sup> Under the EU law, this will include EU nationals who are resident in member state country.

The ILO (2013) reiterated the need for signatory States to enact measures capable of addressing the fundamental rights of all migrants within their territory irrespective of immigration status. The ILO revisited matters relating to fundamental rights when a report of the Director General <sup>54</sup> and reiterated the freedom of association and collective bargaining for migrant workers and domestic workers amongst others. Collective voice could assist domestic workers in challenging their exclusion from the legal protection available to other workers in the labour market. It could also assist them in defending their economic interests and civil liberties as well as the protection from harassment and discrimination, which are especially necessary in a democratic society (Oxfam and Kalayaan, 2008). Reiterating that article 24 of the Universal Declaration of Human Rights, recognises that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay; the ILO (2013) obliged signatory states to follow international standards by according migrant workers the same rights as their national/native workers. Following intense campaigns by the NGO and workers' unions that exposed the loophole in the protection of domestic workers around the globe, the 99th Session of the International Labour Conference prioritised the setting of labour standards to regulate domestic workers and ensuring visibility and respect for them.<sup>55</sup> To rectify the shortcomings in the protection for ODWs, the ILO (2012) suggested a proposal that each member state should take active measures to ensure that domestic workers enjoy the fundamental principles and rights at work, namely:

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<sup>54</sup> ILO: *Organizing for social justice*, Global Report under the follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, Report of the Director General, Report I (B), International Labour Conference, 92nd Session, Geneva: ILO, 2004

<sup>55</sup> ILO: *Decent work for domestic workers*, Report IV(1), International Labour Conference, 99th Session, Geneva, 2010

- (a) Freedom of association and the effective recognition of the right to collective bargaining;
- (b) The elimination of all forms of forced or compulsory labour;
- (c) The effective abolition of child labour; and
- (d) The elimination of discrimination in respect of employment and occupation.

ILO (2010) proposed the setting of a minimum age for domestic work; the regulation of wages, enjoyment of fair terms of employment, as well as decent working and living conditions. The need for effective protection from abuse and harassment, access to justice and membership of a union are also stressed. Perhaps, the most important ILO Convention on domestic workers is the 189 Convention <sup>56</sup> and its accompanying Recommendation <sup>57</sup> adopted by the Labour Conference on 16<sup>th</sup> June 2011. The convention, which sets the current international standards for migrant domestic workers, has been hailed as a landmark treaty by both the ILO and the Human Rights Watch.<sup>58</sup> According to the ILO, the convention ‘‘is all about guaranteeing minimum labour protections for domestic workers and recognising their rights as workers’’.<sup>59</sup> It also seeks to close the gaps in the vulnerability of migrant domestic workers and prevents the abuse of them by their employers whereby offering specific protection to domestic workers. In doing so, the convention lays down the basic rights and principles, and obliges ratifying States to take active steps in ensuring decent work for domestic workers.

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<sup>56</sup> ILO: *The Domestic Workers Convention*, 2011 (No. 189), 100<sup>th</sup> Session of the International Labour Conference, Geneva: ILO

<sup>57</sup> ILO: R201 - *Domestic Workers Recommendation*, 2011 (No. 201), Recommendation concerning Decent Work for Domestic Workers Adoption: Geneva, 100th International Labour Conference session (16 Jun 2011), Geneva: ILO

<sup>58</sup> Human Right Watch, *ILO: New Landmark Treaty to Protect Domestic Workers, Global Labour Standards for up to 100 Million People Worldwide*, June 16, 2011, Available online <http://www.hrw.org/news/2011/06/16/ilo-new-landmark-treaty-protect-domestic-workers> Last accessed August 7, 2015

<sup>59</sup> ILO: *Coverage of domestic workers by key working conditions laws*, Domestic Work Policy Brief No. 5 (Geneva, 2011).

For an effective implementation, article 2(2) of the convention obliges member states to consult with the most representative organisations of employers and workers and, where they exist, with organisations representative of domestic workers and those representatives of employers of domestic workers. The utmost goal of this exercise, according to the Conditions of Work and Employment Program (TRAVAIL) <sup>60</sup> is to enable the following:

1. Identification of categories of workers who would be excluded from the scope of the Convention;
2. Measurements on occupational safety and health;
3. Measurements of social security; and
4. Measurements to protect workers from abusive practices by private employment agencies

Amongst the fundamental rights enshrined in the convention, include the effective:

1. Promotion and protection of the fundamental human rights of all domestic workers (article 3)
2. Protection against all forms of abuse, harassment and violence (article 5)
3. Enjoyment of fair terms of employment as well as decent working conditions and, if they reside in the household, decent living conditions that respect their privacy (articles 6 - 9)
4. Guarantee to normal hours of work, overtime compensation, periods of daily and weekly rest and paid annual leave, on call, and the regulations or collective agreement (article 10)

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<sup>60</sup> See The Domestic Workers Convention, 2011 (No. 189): *Decent work for domestic workers*, Available online [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_161104.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_161104.pdf) last accessed August 24, 2015

5. Ensure that domestic workers enjoy minimum wage coverage without discrimination based on sex (article 11)
6. The right to a safe and healthy working environment (article 13)
7. Respect for social security protection, including maternity benefits (article 14)
8. Access to courts, tribunals or other dispute resolution mechanisms (article 16)

The accompanying Recommendation has provided practical guidance concerning possible legal and other measures to implement the rights and principles stated in the Convention. The first ratifying instrument to be received at the international labour office on 14<sup>th</sup> June 2012 was from Uruguay; followed by the ratification on 5<sup>th</sup> September 2012 by the Philippines. In compliance with Article 21 of the convention, its provisions came into effect on 5<sup>th</sup> September 2013. The convention has also been ratified by 17 countries, is currently in force in 11 countries.<sup>61</sup> Although, it may be argued that Convention (No. 189) in itself, did not introduce any new rules, but consolidates and codifies all the existing labour rules with a view to formulating an international labour standard, significant concentration has to be given to the implementation of the rights contained within the convention. The fact that the convention sets the standard for the treatment and the management of the affairs of domestic workers globally is highly significant (HRW, 2014). To assist with its worldwide implementation, the ILO has published a guide in 2012 to assist with designing labour laws worldwide. It hopes the guide would assist those involved in the review and formulation of labour laws and regulations that aim to protect domestic workers.<sup>62</sup>

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[http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300\\_INSTRUMENT\\_ID:2551460](http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:11300:0::NO::P11300_INSTRUMENT_ID:2551460)  
last accessed August 10, 2015

<sup>62</sup> ILO: *Effective protection for domestic workers: a guide to designing labour laws* / International Labour Office, Conditions of Work and Employment Programme, Industrial and Employment Relations Department – Geneva: ILO, 2012

The ILO argued that a well-drafted labour law would help in addressing the power imbalance between the worker and their employers; whereby minimising abuse and exploitations. Given that the majority of the domestic workers worldwide are women, the ILO also reiterated that law and policy makers must bear the gendered aspect of domestic work in mind, promote laws that provide adequate protection from abuse, harassment and violence, gender-based pay discrimination, maternity protection, and introduce measures to facilitate the balancing of work and family life. Concluding that the laws should deal with specific issues, such as living arrangements, the ILO argues by introducing a measure to ensure decent living conditions, transparent and fair working time arrangements, freedom of movement and communication for the domestic workers; and facilitates complaints procedure for aggrieved workers, the life experience of the domestic workers could be improved. The ratification of the convention by Germany and Italy plainly nullifies the fear of the UK Government and dilutes the Government argument on the incompatibility of the convention with the UK health and safety law, which implements Directive 89/391/EEC - OSH "Framework Directive".<sup>63</sup>

Furthermore, considering that Italy has now incorporated the convention into a collective agreement for the domestic workers, the continued isolation of the UK domestic workers by the actions and inactions of the British Government continue to raise concerns. Although, the European Commission has welcomed the adoption by the EU's Council of Ministers of a Decision authorising Member States to ratify Convention 189,<sup>64</sup> it is difficult to see how, in the absence of any enforceable EU law, countries like the UK, who constantly opt out of most international and EU migration provision, would be persuaded to adopt this convention.

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<sup>63</sup> Council Directive 89/391/EEC OHS Framework Directive *Official Journal L 183, 29/06/1989 P. 0001 - 0008*

<sup>64</sup> European Commission, Working conditions: time for Member States to implement the ILO domestic workers convention, Press Release, Brussels: European Commission, 28 January 2014  
[http://europa.eu/rapid/press-release\\_IP-14-82\\_en.htm?locale=en](http://europa.eu/rapid/press-release_IP-14-82_en.htm?locale=en) last accessed August 16, 2015

## **2.9 CHAPTER CONCLUSION**

This chapter has examined and explored both electronic and hard copies of academic and non-academic literature on the ODWs in the private and diplomatic households. There is nothing in the literature to suggest ODWs are no longer required in the UK. On the contrary, the continued issuance of the ODWs visa to allow non-EU workers to take on the role of domestic workers in the UK suggests these workers are still important to the UK labour market. The history of domestic work in private households as unpaid women chores, coupled with the private nature of the workplace, contribute to the negative experience of domestic workers. In addition, because domestic work is seldom regarded as a proper job, it is not surprising that unlike the work permit issued to other professionals, the ODWs visa gives very little employment and related rights. As such, domestic workers continue to lack some of the protections that are available to other workers. Where domestic workers are entitled and able to assert some employment rights, those rights are often difficult to assert because of other constraints such as immigration and access to justice.

This chapter identified that ODWs personal attributes such as poor socioeconomic background expose them to trafficking and predispose them to great risk in the labour market. A series of political, social and economic factors further complicates their problems. Women make up the vast majority of migrant domestic workers; some of whom were trafficked for labour exploitation and servitude. Even though the UN and other international organisations have attempted to equate any discrimination against migrant domestic workers as discrimination against women, the proposition does not appear to have been widely accepted. The dilemma for member States of the UN is forging a fair balance between the need to maintain sustainable immigration control and respect for the individual's human and labour rights.

Although the ILO convention 189 may not set entirely new laws or introduce new standards, the fact that it is a legal framework that consolidates and harmonises the existing international standards is important. The continued refusal of the UK Government to ratify the convention means the ODWs in the UK are, as yet, unable to take advantage of it. More research is necessary to explore and broaden the understanding of the importance of socio-political and personal factors on the vulnerability of domestic workers, as well as the perspective of employers on the lived experience of the workers. Accordingly, this chapter has identified the need to conduct an empirical research to examine the role of socio economic factors, gender, and politics in the plights of the ODWs, and shed more light on the the current state of domestic work in the UK with a view to identifying the best way forward for ODWs in the UK.



## **CHAPTER THREE**

### **Review of legal texts and documents: National and international jurisprudence**

#### **3.1 AIMS AND OBJECTIVES**

The chapter intends to identify, categorise, and summarise the legal problems of domestic workers with a view to filling some of the gaps in our knowledge of labour, labour-related, and immigration laws that affect ODWs and contribute more generally to our understanding of legal problems faced by domestic workers. To achieve its aim, the chapter will (1) look into the current state of UK employment law insofar as labour disputes are concerned and consider the implication for domestic workers (2) examine the relevant Government policies, including part of the immigration rules that directly or indirectly contribute to workers' dilemmas and restrict their access to justice (3) review how the courts have interpreted aspects of employment law that relate to domestic workers, and (4) pay close attention to relevant public international law and scholarly legal arguments/commentaries.

#### **3.2 INTRODUCTION TO THE CHAPTER**

“In 2013, 232 million people, or 3.2 per cent of the world's population were international migrants, compared with 175 million in 2000 and 154 million in 1990” (UN Population Division, 2013: 1). Globalisation and cross-border migration for the purpose of employment, i.e. economic migration, has become one of the major international discourses (Muñiz-Solari et al., 2010). Notably, of the estimated 214 million people living outside their country of birth in 2010, around 105 million are believed to be engaged in paid jobs (ILO, 2010). Not surprisingly, “the most commonly stated reasons for immigrating to the UK are work-related” (ONS, 2013: 6).

In the UK and around the globe, there are growing concerns that although international migration impacts sometimes adversely on the migrants, the effect on the host nations' economy, national security, demography and population are highly significant (World Bank, 2010). “... people in search of decent work and security are creating new waves of challenge to policymakers who have to find a better way of managing their flow in the interest of protecting human rights, maximising migration's contributions to growth and development, and preventing clandestine flows and trafficking” (ILO, 2004: 1). As such, countries, especially those that receive huge numbers of migrants, have reason(s) to be concerned about the negative impacts of migration (Ruhs and Vargas-Silva, 2014). In the UK, as in most parts of the world, the word ‘migrant’ is economically, politically, and socially sensitive (Morgan and Finniear, 2009). As a result, unfavourable sentiments on migrants could overshadow the positive contribution that migrants make to the economy. The Home Office (2012) agreed immigration has enriched the British culture and strengthened its economy, but maintained a stiffer immigration control is required for the Government to gain public confidence. This could explain the frequent changes in the Government's policy towards migration and migrants. Yet, the control of immigration in itself is not the key issue, but the disproportionate application of control measures on the various groups of immigrants (Doebbler, 2007: 372), and the stigmatisation of migrant workers (Ruhs and Anderson, 2009). Whilst some groups of migrants such as business entrepreneurs are considered important and given special treatment by the Government, ‘low-skilled’ migrants such as ODWs are considered less important and treated less favourably.<sup>1</sup>

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<sup>1</sup> See Lalani, M (2011) *Ending the Abuse: Policies that Work to Protect Migrant Domestic Workers*, London: Kalayaan. Nonetheless, the downgrading of domestic workers is not exclusive to the UK, but a worldwide practice. For the Italian perspective, see Van Hooren, F (2010) *When Families Need Immigrants: The Exceptional Position of Migrant Domestic Workers and Care Assistants in Italian*, Immigration Policy, Bulletin of Italian Politics, 2(2), pp. 21 – 38. For a worldwide perspective, see ILO – *Snapshot ILO in Action: Domestic Workers*, Fact sheet, 31 May 2013, TRAVAIL.

The implication of treating different groups of migrants differently is very serious because of the link between immigration status and employment rights (Spencer and Pobjoy, 2012). A key difference between national- and non-national workers is immigration status that often determines access to justice, as well as social, labour, and political rights of the individual. Non-national workers on visas or work permits are more likely to have restrictions on their rights in the host country (ILO 2003). Of the groups of migrants, those engaged in households appear to be subjected to more stringent, limiting or invasive visa regulations than other migrant workers (Cox, 2012). Whilst both migrant- and non-migrant domestic workers are likely to experience adverse treatment in households, the experience of migrant workers is unique (Iredale, et al., 2003). Their immigration status makes them more vulnerable in terms of the inability to change employer or profession, reduced access to justice, and lack of entitlement to public funds in case of loss of job (Rechel, et al., 2011). Since 6<sup>th</sup> April 2012,<sup>1</sup> newly admitted migrants on the ODWs visa are allowed a maximum of 6 months to stay and work for their endorsed employer(s) only; after which, they must return or face being treated as overstayers, in contravention of the immigration law.<sup>2</sup>

Most countries, including the UK, do not share the ILO interpretation that article 24 of the Universal Declaration of Human Rights<sup>3</sup> recognised; that everyone has the right to rest and leisure, including reasonable limitation of working hours and periodic holidays with pay, and obliges the signatories to give migrant workers the same rights as their national/native workers. So, most national laws continue to differentiate between national and non-nationals, and between those who are residing legally (and allowed to work) from those who are illegal *ab initio* because they enter the UK without leave (undocumented) and those whose leave to remain has expired but have refused to depart (overstayers).

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<sup>2</sup> See The [Immigration Act 1971 c77](#), section 24(1) (b)(i)).

<sup>3</sup> United Nations, *Universal Declaration of Human Rights*, Resolution 217A (III), 10 December 1948

Anyone, other those who do not require a visa, who enters the UK without leave would be doing so in contravention of s.24 of the Immigration Act 1971. Where the person has obtained leave by deception, he/she would be deemed to have entered the UK illegally and could be in further contravention of sections 24(A) and 26(1)(c) of the 1971 Act. Such a person may also face criminal prosecution under the Forgery and Counterfeiting Act 1981. Although the plight of undocumented workers is not the focus of this research, given the ease with which a legal domestic worker could become an illegal worker, by overstaying the visa or by escaping abusive employer,<sup>5</sup> it is relevant to examine factors, such as lack of opportunity to renew their visa, which predisposes legal workers to becoming undocumented workers. Pragmatically, live-in ODWs who are looking after their employer(s) child/children are more likely to develop stronger ties with the children; it would be devastating for the families if, after six months of their arrival in the UK, they had to let go of the workers so that they could employ a new domestic worker in the UK. This could explain the danger behind immigration control policies that do not give more consideration to human feelings. One of the core themes that emerged from the findings of the 2-year Economic and Social Research Council (“ESRC”) funded project titled: *Undocumented Migrants, Ethnic Enclaves and Networks: Opportunities, traps or class-based constructs* held at the London Metropolitan University on 6<sup>th</sup> December 2013 was that the stricter the immigration law becomes, the more the number of undocumented workers that would remain in the UK.

### **3.3 IMMIGRATION POLICIES AND LAW ON DOMESTIC WORKERS**

The major changes that the UK Government introduced to the ODWs visas, took effect on the 6<sup>th</sup> of April 2012. Unlike those on the pre 6<sup>th</sup> April 2012 ODW visas who are allowed to stay beyond 12 months provided they remained employed, the current visa only allows workers to accompany their employers in the UK for a maximum period of 6 months, after which they

must leave the UK.<sup>4</sup> With regards to domestic workers accompanying their diplomat employers to work for them in the UK, their visas are issued under Tier 5 points based-system and in accordance with the UK obligation under the international agreement.<sup>5</sup> However, the current changes to the domestic workers' visas are not the first. Over the years, numerous changes have been made to the visas and residence permit for overseas domestic workers in private and diplomatic households (Gower, 2012). These changes, which are deeply rooted in Government immigration policy at the relevant times, can be understood by examining the timeline of the ODWs visa.

### **3.3.1 PRE 1998 DOMESTIC WORKERS VISAS**

At the end of the Second World War in 1945, the workforce shortage in the domestic work industry prompted the then UK Government to recruit domestic workers, especially women from France and Germany, to fill in the gap (Chick, 2007; Cohen, 1995). This accounts for the first wave of the influx of domestic workers in the UK. According to Parliamentary records, a record 16,488 foreigners were recruited to the public sector whilst an extra 13,861 permits were issued to private employers recruiting foreign workers to work in their households as cooks, nannies, and maids.<sup>6</sup> As more British women who were previously referred to as housewives began to get paid jobs outside the households, a further need to employ foreign domestic workers and au pairs became more necessary (Cox, 207; Lutz, 2012). Thus, in addition to the aristocrats, middle class/working class British nationals also began to employ foreigners to assist with household chores. According to Delap (2012), a 1964 survey of members of the British Federation of University Women found that over 90% of Respondents employed domestic help, ranging from a residential servant to mother's help or au pair.

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<sup>4</sup> See Part 5, Paragraph 159A of the Immigration Rules

<sup>5</sup> United Nations, Vienna Convention on Diplomatic Relations, Treaty Series, [vol. 500, p. 95](#).

<sup>6</sup> See UK House of Common Hansard: HC Deb 17 July 1947 [vol 440 cc596-7](#)

Although some British nationals continued to work as live-in maids, with a steady increase in the number of foreigners taking on paid roles in UK households, the number of native live-in domestic workers began to decrease (Kilkey et al., 2013). However, like their counterparts in the Victorian era, domestic workers in private households continued to be ill-treated by their employers (Delap, 2012) while the Government continued to turn a blind eye to their plight (Nick and Kumarappan, 2011). The interests of mainly sociologists and social historians in the 1960s through the 1980s brought the plight of domestic workers to the forefront of public debate and made workers more visible (Todd, 2009). Contemporary domestic workers remain equally vulnerable through stigma, informal employment, migration status, lack of English language skills, and lack of legal protection (HRW, 2014; ILO 2013). The fact that domestic workers often experience negative treatment did not persuade the UK Government from discontinuing the issuance of the ODWs visa. Contrarily, more visas were issued to women from the Philippines to work as resident domestics in Great Britain in accordance with the provisions of the work permit scheme which are that no suitable worker is available from the resident labour force''.<sup>7</sup> Against this backdrop, the Government allowed business entrepreneurs, diplomats, tourists and British expatriates returning from abroad to bring their domestic workers with them. Before 1979 when the Conservative-led Government came into power, the visa issued to domestic workers allowed them to remain in the UK for as long as the employers required their services (Oxfam and Kalayaan, 2008). However, in 1980, Margaret Thatcher's Government abolished work permits for domestic workers and replaced it with a concession under which wealthy individuals could bring their domestic servants with them to the UK for a maximum period of 6 months without the worker being able to change employer or have the opportunity of visa extension in the UK.

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<sup>7</sup> House of Commons, *Philippines Women (Domestic Servants)* (Hansard, 21 May 1976) also UK House of Commons Hansard: HC Deb 21 May 1976 [vol 911 cc750-1W](#)

The strict condition attached to the visa meant that those who escaped their employers because of ill treatment and/or exploitation became undocumented and remained in the UK illegally. According to Anderson (1999), the problem increased to the extent that the BBC ran a program on ‘domestic slavery’ on 16<sup>th</sup> November 1987 to highlight the plight of the workers. Despite this, and a series of media campaign and outcries, workers’ problems persisted for decades. The problem was also identified by some politicians as reflected in one House of Commons ‘Early Day Motion’ :

That this House notes with concern the continuing plight of some overseas domestic workers brought into the United Kingdom under a 1980 concession which ties them irrevocably to a single employer, thus creating a system of tied labour in this country; and, noting that the tightening of immigration procedures in 1991 has not resolved the problem, calls upon the Secretary of State for the Home Department to ensure that all domestic workers from overseas are provided with an immigration status which will enable them to change employers within the same category of work whilst in the United Kingdom ....<sup>8</sup>

The dilemma of these workers led to the formation of the Commission for Filipino Migrant Workers (CFMW) in 1980 to present a common voice for them and allow them to share their experiences. This further led to the emergence in 1984 of ‘Waling-Waling’ as an organisation of unauthorised migrant domestic workers. But, it was the formation of Kalayaan in 1987 that gave the greatest voice to workers (Anderson, 1999). As an advocacy provider, Kalayaan started to collect data on the numbers of domestic workers using its services and the type and extent of their problems. The statistics served as an evidential tool to campaigners, academics, and activists. Meanwhile, despite pressure from various organisations, and a series of parliamentary debates,<sup>9</sup> the Conservative Government remained unimpressed. Timothy Kirkhope, the then Home Secretary maintained:

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<sup>8</sup> House of Commons Hansard, *Early day motion 452: Overseas Domestic Workers*, Dudley Fishburn, House of Commons Business Paper, [Session 1993-94](#)

<sup>9</sup> See House of Lords, *Overseas Domestic Workers* (Hansard, 28 November 1990), Debate on domestic workers exploitation, HL Deb 28 November 1990 [vol 523 cc1037-58](#); See also House of Lords debate on Domestic Employment: Working Hours, HL Deb 09 July 1993 [vol 547 cc79-80WA](#)

We have received a number of representations in support of allowing overseas domestic workers to change employers, but we consider that this would be contrary to the *purpose of the scheme*, inconsistent with our immigration controls and against the interest of the resident labour force. Each case involving a domestic worker who wishes to remain in the United Kingdom after having left his or her employer is carefully considered and account is taken of any compassionate circumstances.<sup>10</sup>

What the Government meant by ‘purpose of the scheme’ was not clear. But, it appeared the purpose of the scheme is to entice foreign investors, entrepreneurs and businesses in the UK; rather than being interested in opening the door to unskilled or low-skilled workers migrants. Nevertheless, owing to a change in Government in 1998, the Labour Government announced on 23rd July 1998 that it had introduced a revised concession to the ODWs visa.

### **3.3.2 1998 – 5<sup>TH</sup> APRIL 2012**

The concession allowed the ODWs who had overstayed their visa to be regularised. But, the drastic change brought by the concession was that it allowed ODWs to change employers in the UK, bring their family to live with them, and gave them the opportunity to settle in the UK after a continuous 5 years employment. The concession was incorporated into the immigration rules on 18<sup>th</sup> September 2002 when the Secretary of State introduced a statement of change HC 395 to the parliament.<sup>11</sup> However, domestic workers in diplomatic households were not allowed to change from diplomat employers to private employers. Notably, the requirements for leave to work in diplomatic households, which was previously contained within paragraphs 152 – 157, was deleted on 27 November 2008 by paragraph 39 of Statement of Changes HC 1113. Visas for domestic workers in the diplomatic households are now issued under Tier 5 (Temporary Worker International Agreements) category of the points-based system.

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<sup>10</sup> House of Common, *Overseas Domestic Workers (Hansard, 28 November 1996)*, HC Deb 28 November 1996 vol 286 c321W

<sup>11</sup> Home Office: HC 395 of 1993-4 as amended by Cm 5597 of 22 August 2002, London: Statutory Office. See also Home Office, Guidance – Domestic workers in private households – v9.0, Valid from 12 December 2013.



Although the concession for ODWs in the private households was praised nationally and internationally as a ‘good practice’,<sup>12</sup> in relation to ODWs in diplomatic households, the UN has argued that all practices that prevent workers from changing employers and all types of visa that tie the bearer to the employer are unacceptable.<sup>13</sup> This is because tying the worker to a particular employer could negatively affect the power balance between the employer and the employee.

It is also important to note that initiatives by host countries which encourage migration and authorise their legal stay via special visas for domestic workers may have unintended consequences and contribute to placing the migrant workers in a situation of dependency and vulnerability without protecting them or giving them the possibility to change their situation.<sup>14</sup>

In 2006, with the accession of Romania and Bulgaria into the EU in sight,<sup>15</sup> the Government anticipated workers from these countries would take on domestic work and other low-skilled roles in the UK. As such, the Government proposed the replacement of ODW visas with a visitor-like visa that allowed domestic workers to the UK for a period not exceeding 6 months. In response to a question in parliamentary debate on domestic workers, the ex-Parliamentary Under-Secretary of State for the Home Department Joan Ryan stated:

Overseas domestic workers accompanying their employer to the UK are generally low-skilled. As I have explained, our policy under the points-based system is to phase out low-skilled migration in response to the number of workers available from the newly enlarged EU. We expect that in most cases EU countries should be able to provide us with adequate labour in this respect. ... We do not currently have any evidence of a shortage of domestic workers.<sup>16</sup>

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<sup>12</sup> ILO: *Multilateral Framework on Labour Migration Non-binding principles and guidelines for a rights- based approach to labour migration*, 2006, p.82; See also UN: *Report of the Special Rapporteur on the human rights of migrants, Mission to the United Kingdom of Great Britain and Northern Ireland*, 16 March 2010, pp.15-16, 19-20

<sup>13</sup> UN General Assembly, *Report of the Special Rapporteur on contemporary forms of slavery, including its causes and consequences*, A/HRC/15/20, 18 June 2010, p.21

<sup>14</sup> OSCE *Occasional Paper series no. 4, Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude*, 2010, Vienna: OSCE/ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 17-18 June 2010

<sup>15</sup> European Commission: *Monitoring report on the state of preparedness for EU membership of Bulgaria and Romania*, 26/09/2006 COM (2006), Brussels: European Commission.

<sup>16</sup> House of Commons, Migrant Domestic Workers [10 May 2006], Westminster Hall debate, 10 May 2006: [Column 101 - 107WH](#)

However, with continued reports of abuse and exploitation, the emerging issues of trafficking for domestic servitude, and the impending Council of Europe Convention on Trafficking,<sup>17</sup> the Government decided to back down on the removal of the ODWs visa. A formal announcement to maintain the ODWs visa was made to parliament on 25<sup>th</sup> June 2008.<sup>18</sup> This status quo was maintained until 2010 when the coalition Government (Conservative and Liberal Democrat) came into power. Notably, one of the key campaigns of the Conservative party was to cut the level of migration flow into the UK. That pledge was followed through when on 9<sup>th</sup> June 2011, the Minister of State for Immigration Damian Green published a consultation on employment-related settlement, Tier 5 of the Points Based System and overseas domestic workers.<sup>19</sup>

### 3.3.3 6<sup>TH</sup> APRIL 2012 – DATE

The Home Secretary insisted it was never the intention of the Government to allow low-skilled workers to work and settle in the UK. Following an intensive consultation, the Government concluded that the ODWs visas were not fit for purpose.<sup>20</sup> Notably, the Home Secretary asserted that, contrary to the reports of abuse and exploitation, the common reason cited by the majority of those on the pre April 2012 ODWs visa wishing to change employer was to provide the opportunity for better pay and working conditions. One may begin to wonder whether, by citing ‘better working conditions’ the workers had not clarified or at least indicated something was wrong with the old employer. Nevertheless, the Home Secretary laid a published statement of intent before Parliament on 15<sup>th</sup> March 2012.<sup>21</sup>

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<sup>17</sup> Council of Europe Treaty Office – Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, [Warsaw, 16.V.2005](#) - Ratified by the UK Government on 17 December 2008

<sup>18</sup> See House of Commons Hansard Debates for 17 Mar 2010 (pt 0004), HC Deb 17 March 2010 [c271WH](#)

<sup>19</sup> See The Home Office, UKBA: *Employment-related settlement, Tier 5 and Overseas Domestic Workers A consultation*, June 2011

<sup>20</sup> See Home Office: *Impact Assessment Changes to Tier 5 of the Points Based System and Overseas Domestic Worker routes of entry*, IA No. [HO0053](#), 15<sup>th</sup> March 2012.

<sup>21</sup> Home Office, *Statement of intent: Changes to Tier 1, Tier 2 and Tier 5 of the points based system; Overseas domestic workers; and visitors*, 29 February 2012; see also Home Office, UKBA: *Statement of Changes in Immigration Rules* [HC1888 of 2010-12](#)

The statement confirmed the current position, which as from 6<sup>th</sup> April 2012 has restricted the duration of the ODWs visa to a maximum stay of six months, without any right to renew or to change their employer whilst in the UK. Domestic workers in diplomatic households are allowed to stay for a maximum of 5 years (provided they remain employed) after which they must depart the UK.<sup>22</sup> The Government promised to introduce a new set of protections aimed at minimising the likelihood of abuse and exploitations. Amongst these is the promise to strengthen pre-entry requirements by seeking more evidence of an established employer-employee relationship, as well as written terms and conditions of employment (Gower, 2012). It is argued that an assurance of this nature, which is based on the assumption that any employee who manages to stay with his/her employer for more than one year is probably well treated by the employer, is misconceived. Factors such as lack of legal protection, reduced or no access to justice in the worker's own country or in the country where he/she was employed, and the individual's socio-economic status are just a few of the various elements which may hinder the worker's ability to seek justice against the employer. It is therefore indefensible to argue that a worker's continuous employment with an employer is enough to show that the relationship between the party is sound. The Home Secretary has also insisted that printed information would be given to those applying for the ODWs visa to alert them to their rights in the UK. The statement failed to take into consideration the simple fact that some of the domestic workers may not be able to read English or any other language. Further, the Home Secretary relied on the National Referral Mechanism ("NRM") in her claim that appropriate mechanisms have been put in place for potential victims of trafficking for domestic servitude. However, few people would agree that the NRM is working.<sup>23</sup>

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<sup>22</sup> It would be highly interesting to see what ground the Home Secretary would use to refuse indefinite leave to remain in the UK to the first wave of domestic workers on the diplomatic households visa who may achieve 5 years continuous residence and employment in the UK by the year 2017.

<sup>23</sup> See The Anti-Trafficking Monitoring Group – *Briefing: Discrimination in the identification process* . [http://www.ecpat.org.uk/sites/default/files/atmg\\_briefing\\_discrimination\\_in\\_the\\_identification\\_process.pdf](http://www.ecpat.org.uk/sites/default/files/atmg_briefing_discrimination_in_the_identification_process.pdf) last accessed August 22, 2015.

In any event, whilst the effect of the new visa on the plights of domestic workers in the UK is becoming visible, one may not be able to quantify the level of impact it would have on domestic workers at this stage. Besides, a comprehensive review of the visa by the Government is not due before April 2017.<sup>24</sup>

### 3.4 CRITIQUE OF THE CURRENT DOMESTIC WORKERS VISA

The current ODWs visa that has drastically removed all the privileges previously given to the ODWs in the UK has been rigorously criticised for its shortcomings in the protection of the workers.<sup>25</sup> One of the key arguments is that the visa sets ODWs back to the position they were before the 1998 concession. Given that the vast majority of these workers are women, the new visa could be argued to have discriminated against women. If, which is argued that this is the case, the visa is incompatible with the UK obligation under the Migration for Employment Convention (“MEC 1949”)<sup>26</sup> that the UK ratified on 22<sup>nd</sup> January 1951. Article 6 of the Convention prohibits all forms of discrimination in respect of nationality, race, religion, or sex, to immigrants. Relying on this article, On 29 August 2012, the Trades Union Congress (“TUC”) in collaboration with the Anti-Slavery International and Kalayaan provided the ILO Committee of Experts that concerns itself with the UK implementation of MEC 1949 with a written observation. The observation which the committee published in its 2013 report<sup>27</sup> mentioned that the ODWs visa that compels the bearer to reside with employer, predisposes them to a substandard working and living conditions and makes them more vulnerable to abuses.

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<sup>24</sup> See Home Office: *Impact Assessment Changes to Tier 5 of the Points Based System and Overseas Domestic Worker routes of entry*, IA No. HO0053, 15<sup>th</sup> March 2012.

<sup>25</sup> See Kalayaan (2013) [Response to Draft Modern Slavery Bill, December 2013](#); Trades Union Congress(2013), [Call for Ratification of ILO Domestic Workers Convention](#). See also Salih, I.I (2013) *Domestic Workers In The UK: Which Way Forward?* Conference Paper, The Society of Legal Scholars, [Edinburgh Conference 2013](#)

<sup>26</sup> ILO: *Migration for Employment Convention (Revised)*, 32<sup>nd</sup> ILC session (01 Jul 1949) (No. 97) C 097, Geneva: ILO

<sup>27</sup> ILO: Report III(1A) General Report of the Committee of Experts on the Application of Conventions and Recommendations, ILC. 102/III (1A), 102<sup>nd</sup> Session, Geneva: International Labour Conference, 2013, p 798

The observations also mentioned that the removal of the right to change employer amounted to a removal of fundamental safeguards and has increased the workers' vulnerability to abuse and unequal treatment. In its capacity, the committee requested that the UK Government provide a response to the observations and by 2014.<sup>28</sup> Unfortunately, a formal response is yet to be filed by the UK as of July 31, 2015 when this thesis was finalised.

### 3.5 TRAFFICKING FOR DOMESTIC SERVITUDE

The UN Protocol to prevent, suppress and punish trafficking,<sup>29</sup> otherwise known as the 'Palermo Protocol' is the first international instrument to define and address trafficking. Article 3 of the Protocol that mainly concerned itself with penalising and deterring traffickers defines trafficking in persons as the recruitment, transportation, transfer, harbouring or receipt of persons, by means of the threat, force, abduction, fraud, deception, abuse of power or of a position of vulnerability. Although Article 6 obliged signatory States to provide assistance and protect the victims of trafficking in persons, this provision is often ignored (UN, 2001). Realising that trafficking of the person may involve one or more perpetrators or organised criminals, the UN adopted Convention against Transnational Organised Crime as a legal framework in the fight against transnational organised crime such as trafficking.<sup>30</sup> The protocol did not discuss the mechanism through which victims of trafficking could be assisted but, annex to the United Nations Global Plan of Action to Combat Trafficking in Persons obliges member States to take positive steps in promoting the human rights of the

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[http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100\\_COMMENT\\_ID,P11110\\_COUNTRY\\_ID,P11110\\_COUNTRY\\_NAME,P11110\\_COMMENT\\_YEAR:3084706,102651,United%20Kingdom,2012](http://www.ilo.org/dyn/normlex/en/f?p=1000:13100:0::NO:13100:P13100_COMMENT_ID,P11110_COUNTRY_ID,P11110_COUNTRY_NAME,P11110_COMMENT_YEAR:3084706,102651,United%20Kingdom,2012)  
last accessed August 5, 2015

<sup>29</sup> UN: Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, Supplementing the *UN Convention Against Transnational Organised Crime*, United Nations, *Treaty Series*, [vol. 2237](#), p. 319; Doc. A/55/383, 15 November 2000

<sup>30</sup> UN General Assembly, *United Nations Convention against Transnational Organised Crime*, A/RES/55/25, 8 January 2001

victim of trafficking.<sup>31</sup> So is a series of Organisation for Security and Co-operation in Europe (OSCE) publications.<sup>32</sup> The scale of trafficking for domestic servitude is unknown and extremely difficult to assess.<sup>33</sup> According to the OSCE (2008) the difficulty in assessing the scale of human trafficking for labour purposes is partly because domestic servitude is mostly undocumented in many OSCE participating States. Further, trafficking for domestic servitude covers a range of situations, all of which share features such as: forced labour, obligation to provide work for a private individual, low or no salary, no days off, psychological and/or physical violence, limited or restricted freedom of movement, and the impossibility of a private life. The OSCE has also observed that most of the signatory States do not have laws, which recognise, regulate, and clarify the professional status of domestic workers; and that cultural context often plays a major role in the way in which States tackle issues relating to this group of workers. The OSCE Permanent Council considers human trafficking as an abhorrent violation of the dignity and rights of human beings.<sup>34</sup> The council was concerned that the UN instrument aimed at punishing traffickers has so far not yielded satisfactory results and the root causes of trafficking in human beings has not been adequately tackled, if at all. The Council decided to incorporate best practices and an advanced approach into its anti-trafficking policies, and facilitate cooperation among participating States by adopting an Action Plan to Combat Trafficking in Human Beings.

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<sup>31</sup> UN General Assembly, *United Nations Global Plan of Action to Combat Trafficking in Persons*, Sixty-fourth session, A/RES/64/293, 12 Aug 2010

<sup>32</sup> OSCE Ministerial Council, Decision No. 14/06 *Enhancing Efforts to Combat Trafficking in Human Beings, Including for Labour Exploitation, through a Comprehensive and Proactive Approach*, MC.DEC/14/06 (Brussels, 5 December 2006); OSCE Ministerial Council, Decision No. 8/07 *Combating Trafficking in Human Beings for Labour Exploitation*, MC.DEC/8/07 (Madrid, 30 November 2007); OSCE Ministerial Council, Decision No. 5/08 *Enhancing Criminal Justice Responses to Trafficking in Human Beings through a Comprehensive Approach* (Helsinki, 2008).

<sup>33</sup> OSCE *Report of the Tenth Alliance against Trafficking in Persons Conference - "Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude"*, Vienna, 17-18 June 2010, Research Paper on *Trafficking in Human Beings for Domestic Servitude in the OSCE Region: Analysis and Challenges*, Vienna: OSCE/ Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2010

<sup>34</sup> See OSCE, Permanent Council, Decision No. 557 *Action Plan to Combat Trafficking in Human Beings*, 462nd Plenary Meeting, PC.DEC/557, 24 July 2003

The Council anticipated this comprehensive toolkit will act as a multidimensional approach to combating trafficking, addressing the problem comprehensively whilst protecting victims. Every signatory States to the Council are obliged to enact measures that would allow for the swift identification of victims of trafficking and provide them with necessary assistance rather than applying the criminal codes to their treatment. Identifying victims of trafficking require specialised skills.<sup>35</sup> Determined to improve on the efforts to identifying and assisting victims of human trafficking taking into account especially the vulnerable,<sup>36</sup> the OSCE stressed the importance of developing and applying measures capable of improving labour practices and promoting the effective enforcement of internationally recognised labour rights. All these, the OSCE suggested could be achieved through adequate and effective labour inspections, monitoring of private employment agencies, and the development of programmes to support workers in exercising their labour rights. With a view to tackling human trafficking from the grassroots, OSCE suggested the promotion of awareness-raising campaigns aimed at persons at risk of being trafficked and addressing the social, economic, cultural, political, and other factors that contribute to the vulnerability of being trafficked. The principle in the Palermo protocol has been incorporated into the Council of Europe Convention on Action against Trafficking in Human Beings.<sup>37</sup> Article 1 of the Convention asserts the council's determination to prevent and combat trafficking in human beings,<sup>38</sup> whilst guaranteeing gender equality through a comprehensive framework for the allows for the protection and assistance of victims and witnesses, whilst guaranteeing gender equality, as well as ensuring effective investigation and prosecution of the traffickers.

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<sup>35</sup> UN OHCHR, Recommended Principles and Guidelines on Human Rights and Human Trafficking, E/2002/68/Add.1 (2002). Office of the High Commission for Human Rights, Guideline 2

<sup>36</sup> OSCE *Ministerial Declaration on Combating all Forms of Human Trafficking*, MC.DOC/1/11/Corr.1, 7 December 2011

<sup>37</sup> Council of Europe Convention on Action against Trafficking in Human Beings, CETS No.: 197, Warsaw 16.05.05

<sup>38</sup> *The Council of Europe Convention on Action against Trafficking in Human Beings* (CETS No. 197) Warsaw: Council of Europe, 16.V.2005

Within Article 10, Member States are obliged to provide its competent authorities with persons who are trained and qualified in preventing and combating trafficking in human beings, and identifying and helping victims. Articles 11 – 13 oblige member States to protect, assist and allow the victims of trafficking a period of reflection. Under Article 14, Member States must issue a renewable residence permit to victims of trafficking where the competent authority has considered that their stay is necessary owing to their personal situation; and or for the purpose of their co-operation with the competent authorities in investigations or criminal proceedings. Member States are obliged within Article 15 of the Convention to provide the victims of trafficking with an access to compensation and legal redress. Significantly, Article 26 of the Convention obliges Member States not to impose penalties on victims of trafficking for their involvement in unlawful activities, to the extent that they have been compelled to do so. The provisions of this Convention were formerly incorporated within the Council Framework Decision 2002/629/JHA,<sup>39</sup> has been replaced by Directive 2011/36/EU.<sup>40</sup> This Directive sets out minimum standards to be applied throughout the European Union in preventing and combating human trafficking and protecting the victims. The UK signed the Council of Europe Convention on Action against Trafficking in Human Beings on 23 March 2007 and implemented it on 1<sup>st</sup> April 2009. The Government also opted-in Directive 2011/36/EU in July 2011. In line with the UK Government obligation under Article 10 of the Council of Europe Anti-Trafficking Convention, the UK Human Trafficking Centre (“UKHTC”) was established at the South Yorkshire police and began operations in 2006. The UKHTC, which acts as a central repository for human trafficking intelligence and provides tactical advice to Police forces undertaking human trafficking operations across the UK, works closely with the human trafficking policy team in the Home Office, collect data on potential victims of trafficking (“PVoT”).

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<sup>39</sup> OJ L 203, 1.8.2002, p. 1-4

<sup>40</sup> OJ L 101, 15.4.2011, p.1



It also acts as a competent body of the National Referral Mechanism (NRM), which the Government established in 2009. Since 7<sup>th</sup> October 2013, the UKHTC had become part of, and funded through the NCA general budget.<sup>41</sup> The NRM is intended to provide a way for all agencies such as the police, the UK Border Agency, local authorities and Non-Governmental Organisations to cooperate, share information about potential victims, identify those victims and facilitate their access to advice, accommodation and support. However, the Government has conceded that the hidden nature of trafficking makes it difficult to gain an accurate picture of its true scale and nature.<sup>42</sup> The invisible nature of those trafficked to work in the private households remained a major problem.<sup>43</sup> Although the UK Government has reported that the NRM assisted it in dealing with trafficking issues, it conceded more still needs to be done on the identification and the treatment of the victims, as well as bringing the traffickers to justice.<sup>44</sup> In the view of the Crown Prosecution Services (“CPS”) in England and Wales, there is no definitive definition of a trafficked victim, but the key feature that prosecutors should look for is whether the trafficked victims lose their freedom to the extent that they could not escape their captors.<sup>45</sup> But, it remained unclear whether the CPS meant a person who is not physically restrained by the abuser may not qualify as a victim of trafficking. Not suprising both the Bar Council and the Law Society have argued rather than the law concentrating on the traffickers, the vulnerable individuals who have been trafficked to the UK were targeted.<sup>46</sup>

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<sup>41</sup> House of Common, Daily Hansard – Written Answers, 3 Jun 2013: [Column 896 – 920W](#)

<sup>42</sup> Home Office – Human Trafficking: The Government’s Strategy, London: HM Government, 2011. <http://www.homeoffice.gov.uk/publications/crime/human-trafficking-strategy?view=Binary> Last accessed August 12, 2015

<sup>43</sup> See OSCE *Report of the Tenth Alliance against Trafficking in Persons Conference - “Unprotected Work, Invisible Exploitation: Trafficking for the Purpose of Domestic Servitude”*, Vienna: OSCE / Office of the Special Representative and Co-ordinator for Combating Trafficking in Human Beings, 2010

<sup>44</sup> Home Office – *First annual report of the Inter-Departmental Ministerial Group on Human Trafficking*, Cm 8421, October 2012. p. 33 – 36

<sup>45</sup> UK Crown Prosecution Services, *Human Trafficking and Smuggling*, available online. [http://www.cps.gov.uk/legal/h\\_to\\_k/human\\_trafficking\\_and\\_smuggling/](http://www.cps.gov.uk/legal/h_to_k/human_trafficking_and_smuggling/) last accessed August 8, 2015

<sup>46</sup> The Law Society, *Criminal prosecutions of victims of trafficking*, 6 October 2011, <http://www.lawsociety.org.uk/advice/practice-notes/victims-of-trafficking/> last accessed August 10, 2015

One of the key problems with prosecuting victims of trafficking is the inability of the crown prosecution services, the Police, and or the Home office to find them credible as genuine victims of trafficking.<sup>47</sup> In *R v Ajayi*,<sup>48</sup> the Court of Appeal commented: “we accept that a person who has been trafficked may give different accounts, or be understood to have given different accounts, for various reasons; there may be problems of translation; there may be problems occasioned by trauma; or one may have a situation in which somebody who is a genuine victim glosses the story in order to make it more believable”. It follows that just because a victim change his/her initial story or there being a gap in the story is not enough to rule that he/she is not credible. The competent authority needs to consider the individual’s case carefully. Perhaps the reason why finding a victim of trafficking credible is problematic for the Home Office and/or the Prosecution is that such finding would trigger the eligibility of the victim to humanitarian protection; hence a form of residence permit. In *L, HVN, THN and T v R* (Children’s Commissioner for England and the Equality and Human Rights Commission intervening),<sup>49</sup> the Court of Appeal quashed the convictions of the four young Vietnamese who had been trafficked and forced to work in cannabis factories. Lord Justice Moses, the Lord Chief Justice of England and Wales commented that the law on trafficking for labour exploitation is well established in *Siliadin v France* (Application No 73316/01, 26 October 2004); *Rantsev v Cyprus and Russia* (Application No 25965/05, 10 January 2010); *R v K(S)* [2013] QB 82, and *R v Connors* [2013] EWCA Crim. 324. In the Lord Chief Justice view, the key principle has been clearly stated at paras [2]-[6] of *R v N*; *R v L* [2013] QB 379:

Every vulnerable victim of exploitation will be protected by the criminal law ... there is no victim, so vulnerable to exploitation, that he or she somehow becomes invisible or unknown to or somehow beyond the protection of the law. Exploitation of fellow human beings ... represents deliberate degrading of a fellow human being or human beings.<sup>50</sup>

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<sup>47</sup> See Home Office – *First annual report of the Inter-Departmental Ministerial Group on Human Trafficking*, Cm 8421, October 2012. p.37

<sup>48</sup> [2010] EWCA Crim 471

<sup>49</sup> *L, HVN, THN and T v R* [2013] EWCA Crim 991

<sup>50</sup> *L, HVN, THN and T v R* [2013] EWCA Crim 991, para 12

In addition to those who have been trafficked and have entered the UK without any document, or the proper immigration document, whereby making them undocumented and prone to domestic servitude; those who are working on a valid ODWs visa, may also be victims of trafficking if the employer has lied to them about the nature of the job and their entitlement.<sup>51</sup> Realizing the defects in the protection of domestic workers, Government introduced the Modern Slavery Act 2015, c.30. However, the law has been heavily criticised as a lost of opportunity in the protection of the workers because it failed to allow domestic workers the chance to change employer (ILPA, 2015; Kalayaan, 2015); a sticking point that was strongly debated throughout the enactment of the law. However, rather than waiting until 2009 before the current ODWs visas were reviewed, the Government commissioned which report was expected in July 2015, but is yet to be made available.

### **3.6 RESIDENCE PERMIT FOR VICTIMS OF TRAFFICKING**

The destructive impact of trafficking on the victims could range from economical, psychological, and emotional (Farrell, 2011; UNODC, 2008). Victims of trafficking for domestic servitude, especially those from countries that require visas to work in the UK are prone to experiencing a double loss because they often find it difficult to convince the authority that they should not be removed from the UK (Mills, 2011; Williams, 2012). Given their poor socio-economic background and considering that during the servitude period, the victims may not have been paid at all, a removal to their country of origin could further make their life a misery, and could subject them to the risk of re-trafficking.

Human traffickers prey on people who are poor, isolated and weak. Issues such as disempowerment, social exclusion and economic vulnerability are the result of policies and practices that marginalise entire groups of people and make them particularly vulnerable to being trafficked.<sup>52</sup>

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<sup>51</sup> See *Taiwo v Olagibe* [2013] ICR 770

<sup>52</sup> United Nations (2008), *An Introduction to Human Trafficking: Vulnerability, Impact and Action*, Vienna: United Nations Office on Drug and Crime, 2008, p.3

The EU Charter of fundamental rights,<sup>53</sup> obliges Member States to respect and protect human dignity (Article 1), respect the individual's right to physical and mental integrity (Article 3), and prohibit torture, inhuman, degrading treatment, or punishment (Article 5). In addition, the EU Council, through Article 7 of Directive 2004/81/EC,<sup>54</sup> obliged Member States to issue a residence permit to the non-EEA nationals' victims of trafficking that are co-operating with competent authorities. However, because Article 9 – 12 of the Directive obliged the Member States to ensure that those who are granted the residence permit sufficient resources are their special needs are met; the requirement to grant the residence permit appeared to have posed, in particular, economic strains on some of the Member States.<sup>55</sup>

Article 14 of the Council of Europe Convention on Action against Trafficking in Human Beings<sup>56</sup> has re-asserted that the Signatories should issue residence permit to the victims of trafficking. However, under EU Trafficking Directive<sup>57</sup> adopted on 21<sup>st</sup> March 2011, the issue relating to the provision of residence permit for the non-EEA nationals who are victims of trafficking, was left entirely at the mercy of the individual Member States.<sup>58</sup> Instead, Article 11 of the Directive simply mentioned in so far as the State's obligation to grant international protection to those who deserves it is taking into consideration, the State must provide assistance and support to the victims. As such, there is no clear definition for the type of assistance and support that must be provided by the State. The UK Government did not act until after it was criticised by the European Court of Human Right.<sup>59</sup>

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<sup>53</sup> Charter of Fundamental Rights of the European Union *OJ C 326*, 26.10.2012, p. 391–407

<sup>54</sup> Council Directive 2004/81/EC of 29 April 2004, *Official Journal L 261*, 06/08/2004 P. 0019 - 0023

<sup>55</sup> EU – *Balancing protection and prosecution in anti-trafficking policies: A comparative analysis of reflection periods and related temporary residence permits for victims of trafficking in the Nordic countries, Belgium and Italy*, Copenhagen: Nordic Council of Ministers 2012

<sup>56</sup> Council of Europe Convention on Action against Trafficking in Human Beings  
Warsaw, 16.V.2005.

<sup>57</sup> DIRECTIVE 2011/36/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 5 April 2011 on preventing and combating trafficking in human beings and protecting its victims, and replacing Council Framework Decision 2002/629/JHA, 15.04.2011, *Official Journal of the European Union*, L101/1

<sup>58</sup> Directive 2011/36/EU, *Ibid*, para 17

<sup>59</sup> See *CN v United Kingdom* (4239/08) (2013) 56 E.H.R.R. 24; 34 B.H.R.C. 1

The deadline of 6<sup>th</sup> April 2013 for the implementation of this Directive has passed, but the UK is still a long way from achieving full compliance with the Directive.<sup>60</sup> The Home Secretary has discretion to grant leave to remain in certain circumstances. This discretion, previously known as Exceptional Leave to Remain has since 1<sup>st</sup> April 2003 been renamed Humanitarian Protection (“HP”) and Discretionary Leave (“DL”). Whilst HP may be considered in failed asylum cases, DL may be given in cases where the Home Secretary is satisfied that Leave is appropriate. In cases involving trafficking for domestic servitude, the NRM is the appropriate procedure. The UKBA (Home Office) and the UK Human Trafficking Centre (UKHTC) who are the two designated competent authorities to examine cases of those identified as Potential Victim of Trafficking (“PVoT”), get referrals from 17 authorised agents across the UK. Cases involving PVoT who are EEA nationals are dealt with by the UKHTC, whilst cases involving non-EEA nationals are dealt with by the UKBA. In addition to the authorised referring agents, the Home Secretary also issued guidance to Frontline staff to assist them in dealing with issues of trafficking.<sup>61</sup> According to the guidance, the apparent consent of a victim to be controlled and exploited is irrelevant when threat, force, abduction, fraud, deception, abuse of power, or money exchange is used to get that consent.<sup>62</sup> The Home Secretary advised all Frontline staff to identify PVoT at any stage in the border and immigration process.<sup>63</sup> Most essentially, staff working in the border force, enforcement team, asylum processing, and detention centres have been put on notice.<sup>64</sup>

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<sup>60</sup> See Home Office - *Human Trafficking: The Government's Strategy*, 2011  
[http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/UK\\_Government\\_strategy\\_2011.pdf](http://www.ungift.org/doc/knowledgehub/resource-centre/Governments/UK_Government_strategy_2011.pdf)  
 last accessed August 7, 2015

<sup>61</sup> Home Office UKBA: *Victims of human trafficking – guidance for front line staff* v 3.0, Valid from 26<sup>th</sup> July 2014.

<sup>62</sup> Home Office UKBA: *Victims of human trafficking – guidance for front line staff* v 3.0, Valid from 26<sup>th</sup> July 2013. p.6

<sup>63</sup> See  
[https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/275239/Human\\_trafficking.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/275239/Human_trafficking.pdf)  
 last accessed August 5, 2015

<sup>64</sup> Home Office UKBA: *Victims of human trafficking – guidance for front line staff* v 3.0, Valid from 26<sup>th</sup> July 2013. p.16

Once a PVoT referral has been made to the appropriate competent authority, the victims shall be provided with temporary secure accommodation, medical assistance, helped to cope with the experience, and where necessary, helped with legal advice.<sup>65</sup> If the competent authority finds on the ‘‘balance of probability’’<sup>66</sup> that there are reasonable grounds to believe that the applicant is a PVoT, it must grant the victim a minimum of 45 calendar days for recovery. Reflection must not attempt to detain or remove the victim during this time unless it is justified on public protection or public order grounds.<sup>67</sup> At the end of the 45 days reflection period, the competent authority shall decide whether there is a conclusive ground (‘‘CD’’) to believe that the victim has been trafficked. If the competent authority has conclusively identified that person is a victim of trafficking within the meaning of Article 4 of the Council of Europe Convention on Action Against Trafficking in Human Beings,<sup>68</sup> it shall grant the victim a CD status. If the victim is from a country outside the EEA, he/she may be granted refugee status, HP, or DL to remain in the UK.<sup>69</sup> However, if the conclusive ground is negative, the victim would be asked and may be helped to leave the UK voluntarily or face deportation. Further, the requirement to grant HP or DL would be triggered where:<sup>70</sup>

- (a) The victim has lodged a legitimate compensation claim against the trafficker and a grant of leave would help secure justice for the trafficked person and assist in ensuring the trafficker faces the consequences of their actions. The fact that someone is seeking compensation will be relevant to the consideration but does not, in itself, merit a grant of leave. Leave must only be granted where it would be unreasonable for them to pursue that claim from outside of the UK.
- (b) The individual is cooperating with an ongoing police investigation in relation to their trafficking case and their presence is required for this purpose it may be appropriate to grant leave.

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<sup>65</sup> Home Office - *Victims of human trafficking – competent authority guidance*, [Valid from 24 October 2013](#), p.43

<sup>66</sup> Home Office - *Victims of human trafficking – competent authority guidance*, [Valid from 24 October 2013](#), p.83

<sup>67</sup> See Home Office: *Impact Assessment Changes to Tier 5 of the Points Based System and Overseas Domestic Worker routes of entry*, IA No. HO0053, 15<sup>th</sup> March 2012, p. 51

<sup>68</sup> Council of Europe *Convention on Action against Trafficking in Human Beings*, CETS No.: 197, Warsaw, 16.V.2005

<sup>69</sup> Home Office - *Victims of human trafficking – competent authority guidance*, [Valid from 24 October 2013](#), p.85

<sup>70</sup> Home Office, *'Discretionary Leave', Policy and Law*, [Last Updated: 26 June 2013](#), para 2.4

“The period of leave will depend on the individual facts of the case but must not be less than 12 months and 1 day and normally no more than 30 months (2.5 years). The minimum period of leave ensures that a victim of trafficking who is refused asylum but granted DL has a right of appeal against the rejection of their asylum claim by virtue of Section 83(1)(b) of the Nationality, Immigration and Asylum Act 2002.”<sup>71</sup> Although, an extension of the leave may be granted if appropriate, a more restricted leave may be granted due to the individual’s criminal history.<sup>72</sup> This will be the case where the victim falls to be excluded under Article 1F of the Refugee Convention; there are reasonable grounds for regarding them as a danger to the national security within the terms of paragraph 334(iii) of the Rules; he/she has been convicted of a serious crime within the terms of paragraph 334(iv) of the Rules; and/or where he/she is excluded from HP under paragraph 339D (iii) of the Rules but cannot be removed from the UK.<sup>73</sup> In these instances, the victim may be granted restricted DL to remain for a maximum of 6 months at a time with some or all of the restrictions relating to employment, residence, reporting and a condition prohibiting the person from studying at an education institution.<sup>74</sup> However, the Court of Appeal in *R (on the application of Mayaya and others) v Secretary of State for the Home Department*, C4/2011/3273 granted a declaration to the effect that the Home Secretary’s Asylum Policy Instructions (API) on Discretionary Leave in force before 9 July 2012 were unlawful in so far as they restricted the granting of Discretionary Leave for persons sentenced to 12 months or more for a criminal offence, and quashed that part of the API.

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<sup>71</sup> Home Office, 'Discretionary Leave', Policy and Law, [Last Updated: 26 June 2013](#), para 4.5

<sup>72</sup> Home Office: Discretionary Leave - [UK Border Agency](#). For what constitute a serious crime for the purpose of HP, *R (Mayaya) v SSHD*, C4/2011/3273, on appeal from [2011] EWHC 3088 (Admin), [2012] 1 All ER 1491; see also *PF v Secretary of State for the Home department (Immigration and Asylum Chamber) Appeal Number: IA/10696/2009* (unreported) - Promulgation date: 1 Oct 2013

<sup>73</sup> See *R. (on the application of YA) v Secretary of State for the Home Department* [2013] EWHC 3229 (Admin)

<sup>74</sup> See Home Office – Asylum casework Instructions, Restricted Leave (formerly Restricted Discretionary Leave), [Valid from 28 May 2012](#);

Although, the Home Secretary has since reviewed the duration of the restricted DL,<sup>75</sup> the key issue on the granting of CD status to PVoT is credibility; the test which is subjective.<sup>76</sup> If the decision maker fails to believe the victim, his/her application would be rejected. Comparatively, in May 2006, the Canadian Government issued guidelines for temporary resident permits (TRPs) for trafficked non-citizens.<sup>77</sup> The guidelines allow a temporary residence permit to be issued to victims of trafficking to allow them a “reflection period” of 180-days, during which they may remain in Canada. The victims would also have access to health care through the Interim Federal Health (IFH) Program, including medical and social counselling during this time, and the right to apply for a work permit. Following the 180 day period, an immigration officer may extend the permit depending on the circumstances of the individual case. However the discretion is often applied inconsistently and sometimes, reluctantly. Whilst the Canadian guidelines appeared much better than that of the UK, because it offers 180 days reflection period rather than the UK 45 days reflective period, the fact that both guidelines are not part of the countries immigration law, means that a decision that is solely based on the guidelines is not justiciable; except by a judicial review. The only exception to this is if the victims have specifically asked to be considered for asylum. In any event, the fact that the guidelines are essentially based on the discretion of the individual immigration officers means that decisions on whether a person is a victim of trafficking, would continue to vary according to the responsible officer. The non EEA Nationals who are PVoT are more likely to be deported than been granted CD status.

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<sup>75</sup> Some adjustment to the Restricted DL appear to have been made in the current Nationality Policy. See Home Office - *Nationality Policy Guidance and Casework Instruction Chapter 18, Annex D: The Good Character Requirement Version 4.0*, 9 December 2013

<sup>76</sup> See Home Office - *Victims of human trafficking – competent authority guidance, version 1.0* [Valid from 24 October 2013](#), p.51

<sup>77</sup> See Canadian Council for Refugees, *Temporary Resident Permits: Limits to Protection for Trafficked Persons*, June 2013 <https://ccrweb.ca/en/trafficking/temporary-resident-permit-report> last accessed August 4, 2015



The result of the empirical research conducted for this thesis showed the UKBA often get its CD status decision wrong. In a typical decision, the UKBA often states that it believes the PVoT has been trafficked, but did not believe the PVoT is a ‘victim of trafficking’. In other words, the Home Secretary believed that they are ‘historic victims of trafficking’ who do not require any further assistance. Several cases of judicial review have been brought against such decision.<sup>78</sup> In one of such symbolic cases, a victim, whom the Home Secretary has deemed a historic victim of trafficking because she had been trafficked to Sweden, escaped to Norway and sought asylum, which was refused; before she arrived to seek further asylum in the UK. Finding in her favour, Phillip Mott QC held:

As of the reasonable grounds stage, this is not the end of the matter. The decision maker must go on to consider whether the person needs protection and assistance, either because she is helping police with their inquiries, or because of her personal circumstances. This decision as to whether the person should be “treated as a victim”, “considered as a victim”, or given “victim status” is a purposive one, bearing in mind the aims of the Convention. In this case, it is clear from my conclusion that the decision maker did not ask herself the right initial question. As a result, the decision that the Claimant was not a victim of trafficking because she had not been trafficked into the UK cannot be supported and must be quashed.<sup>79</sup>

Whilst the guidance<sup>80</sup> issued by the Home Secretary to the frontline staff has indicated that people who have been held in domestic servitude are often at the mercy of their trafficker/abuser/employer, those who have been trafficked for domestic servitude are still less likely to be granted residence permit. Nevertheless, the problem with trafficking for domestic servitude is that it is often not visible to the public because more often than not, it occurs in secluded environment. Trafficking for domestic servitude often involves situations where an individual or a family have trafficked the victim to be exploited in the household.

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<sup>78</sup> See *Y, R (on the application of) v Secretary of State for the Home Department* [2012] EWHC 1075 (Admin)

<sup>79</sup> *R (on the application of "E") v. Secretary of State for the Home Department*, [2012] EWHC 1927 (Admin), para 49-50

<sup>80</sup> Home Office – *Victims of human trafficking – competent authorities – version 1.0*EXT Valid from 24 October 2013

Domestic servitude occurs when a household worker has been treated as a slave – subjected to ill treatment; exhausting working hours; humiliated; forced to live and work under unbearable conditions; and being forced to work for little or no pay.<sup>81</sup> Unlike other forms of trafficking such as trafficking for sexual exploitation, trafficking for domestic servitude does not often involve a group or organised criminal gang. Perhaps this could explain why unlike those who have been trafficked by gang members, the Government is less likely to see the danger of re-trafficking or retribution where the victim has not been trafficked by gang members. It is often the case that where complaint has been raised by or on behalf of a PVoT, the Police often feel reluctant to investigate, especially where the complaint relates to trafficking for domestic servitude (Salih, 2013). In *O.O.O and Others v The Commissioner of Police for the Metropolis*,<sup>82</sup> three Claimants who were minors at the time they were trafficked from Nigeria for domestic servitude in the UK had requested the Police to investigate their employers for a breach of Articles 3 and 4 of the ECHR, but the Police failed to do so; whereupon they sought a judicial review. Mr Justice Williams granted a declaration to the effect that the Police have failed in their official duty and awarded damages to the Claimants pursuant to section 8 of the Human Rights Act 1998.<sup>83</sup> The danger of Police failure to investigate or failure to conduct a thorough investigation is that the chance that the competent authority would consider the victim claim credible may be dented. Further, despite the Home Office' claim that the competent authority is mindful of the international humanitarian protection, PVoTs remain subject of deportation. In *EK v The Secretary of State for the Home Department*,<sup>84</sup> the court came to the rescue of a victim of trafficking for domestic servitude who had been threatened with deportation action by the Home Secretary.

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<sup>81</sup> See Home Office - *Victims of human trafficking – competent authorities* – version 1.0EXT [Valid from 24 October 2013](#), p. 28

<sup>82</sup> [2011] EWHC 1246 (QB)

<sup>83</sup> 1998 c.42, [London: OPSI](#)

<sup>84</sup> [2013] UKUT 00313 (IAC) 2013 WL 6047397. **Approved in** *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469; CA (Civ Div); 2013-11-21

The court rebuked the Home Secretary for ignoring the link between the appellant's precarious state of health and the breach of the Home Secretary's protective obligations, in terms of her policy regarding foreign domestic workers and Article 4 of the ECHR; and the duties engaged under Articles 12, 14 and 16 of the Anti-Trafficking Convention. In making a direction under section 87 of the Nationality, Immigration and Asylum Act 2002<sup>85</sup> and directing the Home Secretary to grant a period of leave to the victim, the court clarifies that Trafficking as defined in Article 3(a) of the Palermo Protocol of 2000 falls within the ambit of Article 4 of the ECHR (prohibition of slavery and forced labour) as supported by *Rantsev v Cyprus and Russia* [2010] ECHR 22. The court clarified that for the purpose of Article 4, that there is no distinction between a domestic worker who was trafficked by way of forced labour and one who arrived voluntarily and was then subjected to forced labour. This decision in *EK* was approved in the *AS (Afghanistan) v Secretary of State for the Home Department* [2013] EWCA Civ 1469. The court re-affirmed the three obligations which according to *Rantsev v Cyprus and Russia*, the State has towards the victims of trafficking namely, the need to:

1. Have in place a legal and administrative framework to deter trafficking
2. Protect people the authorities know or ought to know are, have been or are at risk of becoming trafficking victims
3. Investigate suspected acts of human trafficking

Perhaps, more importantly, *EK* sets a very good precedent for those who have been trafficked for domestic servitude. Contrary to the wrongful belief by the competent authority and some members of the law enforcement agents that a person who has entered the UK on a visa may not be a victim of trafficking, the decision obliges the authority to look beyond the physical nature of the visa and consider other issues such as the way the victim was recruited and the way the victims had been treated by the alleged trafficker/abuser.

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<sup>85</sup> 2002 c.41, [London: OPSI](#)

### 3.7 EMPLOYMENT LAW – A BARRIER TO DOMESTIC WORKERS?

The key employment law-related problems faced by domestic workers in the UK private and diplomatic households includes disrespect for their ‘limited’ employment rights – wages problems, working time issues, health and safety concerns and discrimination (HRW, 2014; ILO, 2013).

#### 3.4.1 FAILURE TO GIVE CONTRACT DOCUMENTS

Every employment relationship requires a form of agreement (oral and/or documented) between the parties.<sup>86</sup> This agreement, often referred to as a ‘contract’, has both statutory<sup>87</sup> and common law<sup>88</sup> meaning, which are not dissimilar. The nature of the agreement, which must be mutually accepted by the service receiver or employer<sup>89</sup>, and the service provider or employee<sup>90</sup> – otherwise it could be regarded as forced labour – will depend almost entirely on the nature of the service or job. Globally, one key factor that differentiates domestic workers from other workers is that they often don’t have a written contract of employment (ILO, 2011). ‘‘Historically, the relationship between domestic workers and their employer has often relied on a paternalistic model, rather than on an explicit employment contract under which the worker and the employer each has clearly defined rights and obligations’’ (ILO, 2013: 44).

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<sup>86</sup> See <https://www.gov.uk/employment-contracts-and-conditions/overview> last accessed August 15, 2015

<sup>87</sup> Proviso the ERA 1996 s.230(2); the Trade Union and Labour Relations (Consolidation) Act 1992 c.52, s. 295(1); and within the National Minimum Wage Act 1998 c.39 s 54(2), a contract of employment is defined as a contract of service or apprenticeship, whether express or implied, and (if it is express) whether oral or in writing.

<sup>88</sup> Mackenna J, in *Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance* [1968] 2 Q.B. 497, at p. 515 [approved by *Ferguson v John Dawson & Partners (Contractors) Ltd* [1976] 1 W.L.R. 1213 CA (Civ. Div.)] stated of the conditions necessary for a contract: ‘a contract of service exists if these three conditions are fulfilled. (i) The servant agrees that, in consideration of a wage or other remuneration, he will provide his own work and skill in the performance of some service for his master. (ii) He agrees, expressly or impliedly, that in the performance of that service he will be subject to the other’s control in a sufficient degree to make that other master. (iii) The other provisions of the contract are consistent with its being a contract of service’. Notably, the term ‘contract of service’ as used here relates to an employee and it is can be differentiated from a ‘contract for service’ possessed by a self-employed person.

<sup>89</sup> Within the Trade Union and Labour Relations (Consolidation) Act 1992 c.52 s.295(1); Employment Rights Act 1996 c.18, s.230(4); and the National Minimum Wage Act 1998 c.39, s. 54(4), an employer is ‘‘a person for whom one or more workers work, or have worked or normally work or seek to work’’.

<sup>90</sup> Within s.230(1) of the Employment Rights Act 1996 c.18 and s.54 of the National Minimum Wage Act 1998 c.39, an employee is ‘‘an individual who has entered into or works under (or, where the employment has ceased, worked under) a contract of employment’’.

Although the UK employment statute does not oblige employers to issue employees with a written contract, employers are obliged <sup>91</sup> to give a written statement of particulars of employment that contain the terms of the agreement. Common law has also placed “obligation on the employer to give the employee these particulars”. <sup>92</sup> The purpose of the particulars is to ensure that the employee is mindful of the main terms and conditions of the agreement. The written statement of particulars, which must be given not later than two months after the beginning of the employment, <sup>93</sup> may not cover all matters of contractual entitlement, <sup>94</sup> but it should detail the key aspects of the agreement such as the nature of the job, title of the job or a brief description of the work, the scale or rate of remuneration and the intervals at which remuneration is paid, hours of work and entitlement to holidays, incapacity for work due to sickness or injury, including any provision for sick pay, pension, and length of notice periods. As such, in cases of dispute, the written particulars could assist in throwing more lights on the intention of the parties. <sup>95</sup> While there is evidence to suggest employers of those ODWs admitted to the UK before 6<sup>th</sup> April 2012 often provide them with a form of ‘contract of employment’ with which they renew their visa, the contracts do not often reflect the actual agreement between the parties. <sup>96</sup> Under the law, if an employer does not issue any, or issued a contract that falls short of the statement described above, the employer could be in breach of a statutory provision. <sup>97</sup>

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<sup>91</sup> s.1 of the Employment Rights Act 1996 c 18, London: OPSI

<sup>92</sup> *Ros (t/a Cherry Tree Day Nursery) v Fanstone* UKEAT/0273/07/DM; 2007 WL 3389621 at p. 23

<sup>93</sup> Section 1(2) ERA 1996

<sup>94</sup> See *Allen v TRW Systems Ltd* [2013] I.C.R. D13 EAT

<sup>95</sup> See the dicta of Browne-Wilkinson J. in *System Floors (U.K.) Ltd. v. Daniel* [1982] I.C.R. 54 at p. 58

<sup>96</sup> See *Taiwo v Oliagbe* ET 2350075/2011

<sup>97</sup> If the employers fail to comply with s. 1 and/or s. 4 (where the initial contract has been modified) of the ERA 1996, the employee could make a reference to the Tribunal under s.11. Such a reference is a mere request for declaration. It is not a claim for compensation and it cannot be used as such. However, where the domestic worker has any jurisdictional claim such as unlawful deduction in wages, unfair dismissal, and/or wrongful dismissal, he/she could also ask the Tribunal to take the employer’s failure under s.1 and/or 4 into consideration [See *Scott-Davies v Redgate Medical Services* [2007] I.C.R. 348, 349-350]. In this instance, in addition to making a declaration under s.11, The Tribunal under s.38 Employment Act 2002 c.22 (EA 2002) could award damages for the employer’ failure. Further, under s.31 EA 2002, the Tribunal may increase such award.

But, perhaps due to the lack of regulation and enforcement, and the hidden nature of households, it appears most employers of domestic workers have been getting away with breaking the law (HRW, 2014). The importance of a written contract of employment for domestic workers cannot be overstated.<sup>98</sup> The ILO convention 189 adopted at the 100<sup>th</sup> session of the ILC on 16<sup>th</sup> June 2011, emphasises the need for a written contract of employment.<sup>99</sup> In so far as the plights of domestic workers are concerned, the enactment of a law that will oblige “a written contract for domestic workers may be a significant step in resituating domestic work from the informal to the formal economy. A written contract vitiates difficulties in proving the existence of the employment relationship and its agreed-upon terms, should a dispute arise between the parties”.<sup>100</sup>

### 3.4.2 FAILURE TO GIVE ITEMISED PAYSLIP OR WAGE STATEMENT

The right to an itemised pay statement is contained within s.8 Employment Rights Act 1996 (“ERA 1996”);<sup>101</sup> whilst s. 12 of the National Minimum Wages Act 1998 (“NMWA 1998”)<sup>102</sup> provides the right to be given a written statement of the national minimum wage (“NMW”). The vast majority of domestic workers are either not provided with a written statement, or are issued with one that is often not statutory compliance (ILO, 2010: 21). The essence of this documents is not merely to ensure wages are paid to the workers, but also to ensure that the payment that has been made complies with the minimum wage, reflects no unauthorised deduction, and shows that the correct tax and national insurance contributions are paid on the behalf of the domestic worker (ILO, 2012).

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<sup>98</sup> See ILO – *Effective protection for domestic workers: a guide to designing labour laws* / International Labour Office, Conditions of Work and Employment Programme, Industrial and Employment Relations Department , Geneva: ILO, 2012 pp. 15-16 & 20

<sup>99</sup> ILO – *Domestic Workers Convention, 2011 (No. 189)*. See in particular, Articles 7 & 8 of the Convention and Recommendation 6

<sup>100</sup> ILO – *Effective protection for domestic workers: a guide to designing labour laws* / International Labour Office, Conditions of Work and Employment Programme, Industrial and Employment Relations Department , Geneva: ILO, 2012 para 3.1, p.16

<sup>101</sup> 1996 c.18, London: OPSI

<sup>102</sup> 1998 c.39, London: OPSI

Further, wage statements could provide proof of the existence or adequacy of the financial resources that the worker often needs to provide in his/her relations with third persons, such as banks and the Home Office (ILO, 2012). In a number of countries, wage statements carry the presumption of the payment of the sums indicated and the burden of proof lies with the worker for the rebuttal of such presumption (ILO, 2003: 259). Without the correct wage, or indeed any statement, domestic workers may only become aware that their employers had failed to pay the necessary tax and/or national insurance contribution upon their dismissal/resignation; or upon an application to the Home Office for further leave to remain in the UK. For those domestic workers who are privileged to join a workers' union and/or those who have been correctly informed in a different way; it is not uncommon for them to register with HMRC as self-employed so that they can pay their taxes and national insurance dues on their own (Lalani, 2011).

Notwithstanding that, their employed position is rebuttable under the principle in *Byrne Bros (Formwork) Ltd v Baird*,<sup>103</sup> a registration as self-employed by a worker who is employed could have legal implications; especially when it comes to contractual disputes. Nevertheless, whilst it may be in the interest of domestic workers on the pre-April 2012 ODWs visa to pay tax and national insurance contributions, because evidence of the payments may be required for the Home Office to renew their visa, there is nothing to persuade those on the current non-renewable ODWs visa and the illegal/undocumented domestic workers to pay tax and national insurance contributions. The latter group of workers may, in fact, willingly collide with their employers to defraud Her Majesty Revenue and Customs ("HMRC"). Further, unlike those on the pre-April 2012 who may be held accountable if they do not pay tax and national insurance dues, there is no way that those who work illegally can be monitored or compelled to pay tax and national insurance contributions.

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<sup>103</sup> [2002] I.C.R. 667

### 3.4.3 BREACH OF CONTRACT AND WRONGFUL DISMISSAL

Like other professionals, one of the dilemmas faced by domestic workers is the fear of being wrongfully dismissed (HRW, 2014; Odeku, 2014). Within s.95 ERA 1996, a person is dismissed if the employer terminates his/her contract. Thus, in wrongful dismissal claims, the employee must show that he/she has an enforceable contract that is not tainted with illegality.<sup>104</sup> In most cases, a dismissal is straightforward; for instance, where it is not disputed by the employer, and/or where the employer has provided the domestic worker with a letter that unequivocally states that his/her contract is terminated either before the expiration of a fixed period or without the requisite notice.<sup>105</sup>

Reference to a notice period is in so far as the employee has not been off sick,<sup>106</sup> and there is no legal reason why he/she should not be notified according to the contract and/or under s. 86 ERA, 1996.<sup>107</sup> In the classic statement of Lord Reid, ‘‘at common law, a master is not bound to hear his servant before he dismisses him. He can act unreasonably or capriciously if he so chooses, but the dismissal is valid. The servant has no remedy unless the dismissal is in breach of contract and then the servant's only remedy is damages for breach of contract’’.<sup>108</sup> Section 3 of the Employment Tribunals Act 1996 and Article 6 of the Employment Tribunals Extension of Jurisdiction (England and Wales) Order give the ET the jurisdiction to hear contractual claims. Accordingly, most domestic workers’ contractual claims are heard in the ET.

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<sup>104</sup> The English Courts would refused to support anyone trying to enforce a right that is derived from a criminal conduct. See *Hall v Woolston Hall Leisure Limited* [2000] EWCA Civ. 170; IRLR 578. See also *Soteriou v Ultrachem Ltd* [2004] EWHC 983 (QB); [2004] IRLR 870.

<sup>105</sup> See *Williams v Byrne* (1837) 7 Adolphus and Ellis 177; 112 E.R. 438

<sup>106</sup> Where an employee who has been off sick had exhausted the statutory minimum period, a period of notice may not be necessary - See *Hope v Milson* [2013] All ER (D) 357 (May); UKEAT/0391/12/RN

<sup>107</sup> Under the terms contained in the employment contract or in the employee handbook (if printed separately), both the employee and the employer must have agreed to a notice period. The statement of particulars obliged under s. 1 ERA 1996 should contain the notice period. However, where no notice period has been agreed by the parties, Common law would operates such that the contract is terminable upon a ‘reasonable notice’ by either of the parties (see *Richardson v Koefod* [1969] 3 All ER 1264). For more on wrongful dismissal see Smith, I.T & Baker, A, (2010), *Employment Law*, (10<sup>th</sup> Ed.) Oxford: Oxford University Press, p. 386.

<sup>108</sup> *Malloch v Aberdeen Corpn* [1971] 1 WLR 1578, at para 1581



If successful, the domestic worker can be awarded compensation according to the contractual notice period. Where there is no written contract or where the contractual notice period is in dispute or less than the statutory notice period, the statutory notice period will apply (Brewster and Mayhofer, 2012; Emir, 2014). It is worth noting that compensation for wrongful dismissal could only give rise to a claim in contract and not in tort of negligence. (acas, 2014; Kom and Sethi, 2011). Given that most domestic workers often escape their employers before bringing any claim against them, it may not always be in the best interest of domestic workers to issue a claim for breach of contract because doing so would afford the employer the opportunity to counter-claim in response.<sup>109</sup> If the employer wins, the court may order the domestic worker to pay compensation to the employer.

#### 3.4.4 UNFAIR DISMISSAL AND THE DIFFICULTY IN SEEKING A REDRESS

Until the 1970s, employers had a common law leverage to dismiss employees without giving the employee a chance to be heard (Harcourt, 2012; Walsh, 2012). In *Malloch v Aberdeen Corporation*,<sup>110</sup> the privy council held that where a statute provides for notice of a motion for an employee's dismissal to be given to the employee, natural justice requires that he/she should be given 'a hearing'. Consequently, a decision by an employer to deny the employee any chance of making representation before he/she is dismissed could offend against the rule of natural justice; and could make the dismissal unfair. In the view of Denning M.R, "until recently, an ordinary servant had no security of tenure. He could be dismissed on a month's notice or a month's salary in lieu of notice, although he might have served his master faithfully for years. That was altered by the provisions of the Industrial Relations Act 1971".

<sup>111</sup> This Act is now replaced by the ERA 1996.

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<sup>109</sup> The only exception is where the Claimant has issued a statutory tort claim such as unlawful deduction in wages. If the Claimant does not specifically plead breach of contract as a head of claim, the employer would not be able to counterclaim. Once the Claimant has issued a claim in breach of contract, irrespective of whether this claim is withdrawn the Tribunal would retain the right to consider the employer's counterclaim, if any.

<sup>110</sup> [1971] 1 W.L.R. 1578; [1971] 2 All E.R. 1278; 1971 S.C. (H.L.) 85

<sup>111</sup> *Western Excavating (E.C.C.) Ltd. v Sharp* [1978] Q.B. 761, at para 767

The rights of employees not to be unfairly dismissed by their employer is now enshrined within Part X, chapter I, s. 94 (1) ERA 1996. “[T]he effect of s.94(1) is to remedy the shortfall identified in *Malloch v Aberdeen Corpn* and make it more difficult for employers to dismiss employees unfairly and/or in bad faith”.<sup>112</sup> It follows that any decision to terminate must be objectively justified. In the event that a dismissed domestic worker is not automatically provided with a statement of reason, he/she could request the document from the employer.<sup>113</sup> The employer then has 14 days to provide the document;<sup>114</sup> otherwise, he could be liable to pay costs should the worker complain to the ET under s. 93 ERA 1996. One key problem for ODWs trying to claim unfair dismissal is the eligibility test. Sargeant & Lewis (2012: 94) have referred to this test as a hurdle, which includes employment status, length of continuous service, and illegality. The domestic worker must satisfy the ET that he/she was employed.

Although someone engaged as self-employed could have had his/her contract terminated in the same way as an employed person,<sup>115</sup> unfair dismissal claim is only available to an employed person.<sup>116</sup> Defining ODWs as employees is thus quintessential. In most cases, it may not be difficult to find that a domestic worker in the private household is an employee because the household is deemed to be a business.<sup>117</sup> However, it is often the case that some domestic workers do register with HMRC as self-employed so that they can pay tax and national insurance dues, which the employers have refused to pay on their behalves. A problem that may arise if they claim against their employers is whether by registering with HMRC as self-employed, their contracts of employment have been tainted with illegality; such that the registration precludes them under the doctrine of illegality.

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<sup>112</sup> *Johnson v Unisys Ltd* [2001] UKHL 13, per Lord Hoffman at para 54

<sup>113</sup> *Catherine Haigh Harlequin Hair Design v Seed* [1990] IRLR 175, EAT

<sup>114</sup> See *Keen v Dymo Ltd* [1977] IRLR 118

<sup>115</sup> See Fn. 5 for the definition of an employee.

<sup>116</sup> See <https://www.gov.uk/dismiss-staff/eligibility-to-claim-unfair-dismissal> last accessed August 15, 2015

<sup>117</sup> Emir, S. (2011) *Selwyn's Law of Employment*, (17<sup>th</sup> Ed), Oxford: Oxford University Press, para 2.107, p.70

In the combined appeal case of *Enfield Technical Services Ltd v Payne and Grace v. BF Components Ltd*,<sup>118</sup> the court held a decision as to whether a relationship was one of employment or whether the person performing the services was self-employed would often be very difficult. But the court concluded that an incorrect characterisation (i.e. registering as a self-employed with HMRC but performing a contract of service) of the relationship would not necessarily prevent an employee subsequently claiming the advantages of having been an employee; in so far as the categorisation is not done in bad faith. In *Vidanelage v Gibsonm* (unreported),<sup>119</sup> the ET sitting at London South held the claim of a domestic worker who was registered with the HMRC as self employed was not barred on illegality because she did not collide with her employers to cheat the HMRC. In determining if the worker has been dismissed within the meaning of s.95 ERA, 1996, the onus is on the Claimant to show that he/she has been dismissed.<sup>120</sup>

A domestic worker who tendered his/her resignation with or without notice may not be able to assert a claim to unfair dismissal;<sup>121</sup> except where it could be argued that the resignation is a constructive dismissal or, one that is forced on him/her.<sup>122</sup> The next hurdle that a domestic worker must cross is the qualifying period. Under s. 108 ERA, 1996, an aggrieved worker who wishes to claim unfair dismissal must show that he/she has the relevant two years continuous service.<sup>123</sup> This is highly detrimental, especially for domestic workers admitted to the UK on or after the 6<sup>th</sup> April 2012 who have a maximum of 6 months to reside and work in the UK.

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<sup>118</sup> [2008] EWCA Civ. 393; [2008] I.C.R. 1423

<sup>119</sup> ET2303426/2009 & ET2303547/2009, at para 47

<sup>120</sup> See the dicta of May LJ in *Morris v London Iron and Steel Co Ltd* [1988] Q.B. 493, at 505

<sup>121</sup> See *Johnson v Unisys Ltd* [2001] UKHL 13

<sup>122</sup> See *Hussey v Photogenic Ltd* [2010] All ER (D) 49 (Sep) EAT

<sup>123</sup> The Unfair Dismissal and Statement of Reasons inserts the two years requirement for Dismissal (Variation of Qualifying Period) Order 2012, SI 2012/989 (in force on 6 April 2012). Further, this statutory instrument amends s 92(3) ERA 1996 to increase from one year to two years the qualifying period of continuous employment needed for the entitlement, on request, to a written statement of reasons for dismissal.

Although one may argue that the 2-year waiting period indirectly discriminates against the ODWs, the discrimination may be justified by the Secretary of State under the need to control immigration. In *R. v Secretary of State for Employment Ex p. Seymour-Smith (No.2)*,<sup>124</sup> the House of Lords (now Supreme Court) upheld the Secretary of State's appeal against the Court of Appeal decision<sup>125</sup> that the Unfair Dismissal (Variation of Qualifying Period) Order 1985 that modified the requirement for claiming unfair dismissal was indirectly discriminatory against women, and therefore incompatible with the principle of the Equal Treatment Directive. Their Lordship accepted the extension had a considerable adverse effect on women because a smaller percentage of women as compared to men were able to satisfy the qualifying period, but held that the Government was justified by objective factors unrelated to sexual discrimination that the main objective of the 1985 Order was to encourage recruitment by employers. An exception to the qualifying period is where the ODW has been automatically unfairly dismissed. For instance, where the ODW has been dismissed for asserting a statutory right,<sup>126</sup> or making a protected disclosure.<sup>127</sup> For the ODWs admitted to the UK before 6<sup>th</sup> April 2012, a potential hindrance to claiming unfair dismissal is if the employer decides to terminate their contract a few days or months before the two-year qualifying period. Although the statutory notice period may assist a domestic worker's claim for wrongful dismissal, except if and when s.97(2) ERA, 1996, read with s.86(1) of the Act could make the effective date of termination fall within the qualifying period, a claim of unfair dismissal would be barred.<sup>128</sup>

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<sup>124</sup> [2000] 1 W.L.R. 435; [2000] 1 All E.R. 857; [2000] 1 C.M.L.R. 770; [2000] I.C.R. 244; [2000] I.R.L.R. 263

<sup>125</sup> [1997] 1 W.L.R. 473

<sup>126</sup> In *Ward v Ashkenazi* [2011] EWCA Civ. 172 CA (Civ. Div.), the Claimant, a housekeeper for less than a year was dismissed after she exercised her right under s.1 ERA 1996. The ET whose decision was upheld by the EAT and the court of appeal rules her dismissal 'automatic unfair' under s. 104 ERA 1996. In addition, the Claimant recovered damages under s. 38 Employment Act 2002 with an upliftment under s. 31 of the same Act.

<sup>127</sup> *Vidanelage v Gibson* ET 2303426/2009 & 2303547/2009 (unreported)

<sup>128</sup> See *Harper v Virgin Net Ltd* [2004] EWCA Civ. 271; [2005] I.C.R. 921

Nonetheless, where a Tribunal has found that a domestic worker has been unfairly dismissed, the domestic worker would be entitled to compensation for loss of earnings and as the Court deemed fit.

### 3.4.5 WAGES THEFT OR UNLAWFULL DEDUCTION IN WAGES

Rider to s.13 of ERA 1996, a domestic worker has the right not to suffer any unlawful deduction in wages. Wage is a broad term that includes: (1) any bonus whether contractual or not<sup>129</sup> (2) holiday pay<sup>130</sup> (3) travel allowances, sick pay<sup>131</sup> and other statutory entitlements.<sup>132</sup>

It follows that if a domestic worker has not been paid his/her wage as agreed or on the due date, he/she could be deemed to have experienced an authorised deduction in wages.<sup>133</sup> If a domestic worker's payment falls short of any fees that are due to him/her from the employer, he/she may complain to the Tribunal under s.23 ERA, 1996. Section 23(2) ERA, 1996 provides that a claim for unlawful deduction in wages must be brought to the attention of the tribunal within 3 months of the deduction. However, where the claim could not have been reasonably presented on time,<sup>134</sup> the court may not deny jurisdiction to hear it out of time. The EAT in *Group 4 Nightspeed Ltd v Gilbert*<sup>135</sup> held, it is only when an employer fails to pay a sum due by way of remuneration at the appropriate time (contractual time for payment), that a claim for an unlawful deduction can arise.

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<sup>129</sup> In *Farrell Matthews & Weir v Hansen* [2005] ICR 509, [2005] IRLR 160, the EAT held a declared non contractual bonus constituted wages under the Employment Rights Act 1996 s.27(3) and failure to pay such a bonus amounted to an unlawful deduction of wages under s.13 of the Act. Further, Burton J. in *Clark v Nomura International plc* [2000] IRLR 766 held a failure to pay discretionary bonus could give rise to a claim under s.13

<sup>130</sup> See *Inland Revenue Commissioners v Ainsworth* [2009] UKHL 31; [2009]; [2009] I.C.R. 985

<sup>131</sup> Statutory sick pay under the Social Security Contributions and Benefits Act 1992 (SSCB 1992) Pt XI (ss 151–163). Further, in *Beveridge v KLM UK Ltd* [2000] IRLR 765, the Claimant, employee had been refused payment pending the employer's investigation into her fitness to return to work after some time of unfit to work and the exhaustion of her statutory and contractual sick pay; the EAT held if an employee made himself available for work then at common law he was entitled to be paid unless a particular clause of his contract of employment stated otherwise.

<sup>132</sup> These could include: statutory maternity pay under the SCCB 1992 Pt XII (ss 164–171); statutory paternity pay under the SCCB 1992 Pt XIIA (ss 171ZA–171ZK); Statutory adoption pay under the SSCB 1992 Pt XIIIB (ss 171ZL–171ZT); guaranteed payment under ERA 1996 Pt VI (ss 50–63C); and payment for time off for carrying out trade union activities under the TULRCA 1992 s 169.

<sup>133</sup> See *Elizabeth Claire Care Management Ltd v Francis* [2005] IRLR 858

<sup>134</sup> See *Taylorplan Services Ltd v. Jackson* [1996] I.R.L.R. 184 (EAT)

<sup>135</sup> [1997] I.R.L.R 398 (EAT)

The problem for domestic workers who may be afraid to bring an ET claim against their employers whilst still being employed is that the claim could run out of time. The court in *Group 4 Nightspeed Ltd v Gilbert* held, the time limit under s.23 (3) ERA, 1996 operates according to the type of deduction that the Claimant alleges. Accordingly, different types of payment deduction would require a different time limit.

Where there has been an actual deduction in breach of contract (otherwise a straightforward deduction), the time for the complaint to start to run is the date when that deduction is made, or the payment from which the deduction is made has been tendered. Where all that happens is that the employer pays too little and there is a shortfall, the same principle applies (by virtue of s.13 (3) ERA, 1996 Act) time starts to run from the moment when the reduced payment is made. However, where there is no payment, time may start to run in effect at an earlier date; it will start to run at the time when the contractual obligation to make a payment arose.<sup>136</sup>

Under common law, any claim for unauthorised deduction presented to the ET must not fall into the exclusion to wages under s.27 (2) ERA 1996, and must be quantifiable without the ET having to conduct any extra jurisdictional task to arrive at an award.<sup>137</sup>

It follows that the domestic worker must be able to quantify the amount of the deduction that has been alleged as failure to do so could jeopardise his/her claim; except the claim is brought in the civil court.<sup>138</sup> One other issue in relation to unlawful deduction in wages is the issue of minimum wage, which domestic workers are sometimes not entitled to.

### 3.4.6 NATIONAL MINIMUM WAGE AND THE DOMESTIC WORKERS

The National Minimum wage Act 1998 (“NMWA 1998”)<sup>139</sup> is considered an important cornerstone of Government strategy aimed at providing employees with decent minimum

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<sup>136</sup> *Arora v Rockwell Automation Ltd* Appeal No. UKEAT/0097/06/ZT; 2006 WL 1288417 at para 12

<sup>137</sup> In *Kingston upon Hull City Council v. Schofield* UKEAT/0616/11/DM, 2012 WL 4888821, the EAT held ET might have to decide issues of fact; however, the value to be attributed to a job was a question of judgment, not one of fact, and the employment judge had erred in holding that it was an issue of fact. He had also erred in holding that the tribunal had jurisdiction under s.13 to “put itself in the place of the employer” and to determine the value to be attributed to the Claimant’s job.

<sup>138</sup> See *Coors Brewers Ltd v Adcock* [2007] EWCA Civ. 19; [2007] I.C.R. 983; [2007] I.R.L.R. 440

<sup>139</sup> 1998 c.39, London: OPSI

standards and fairness in the workplace.<sup>140</sup> This strategy helps the Government to look after the lowest paid workers, the majority of which are unskilled and vulnerable to exploitation. Rider to s.1 NMWA 1998, anyone entitled to the minimum wage must not be deprived of it. Further, s.1 (2) NMWA 1998 provides that all workers except the genuinely self-employed are entitled to the NMW provided they are over the compulsory school leaving age and work within the UK. Section 3 and sections 34 – 40 NMWA 1998 provide a list of the categories of persons who may not be entitled to the minimum wage. That list does not expressly or impliedly refer to domestic workers in private and diplomatic households. Thus, in relation to s.1(2) NMWA, the starting point in determining if domestic workers are entitled to the minimum wage is by examining whether a typical domestic worker could be regarded as a worker, working under a contract of employment, and is not of compulsory school age. Domestic workers who under the immigration law<sup>141</sup> are compelled to live under the same roof as their employers are *de facto* workers working under a contract of employment. However, there may be cases where the court will have to decide if a domestic worker is an employee, a lodger/guest, or a family member. In such cases, the courts would have to take a holistic view on the relationship between the parties.<sup>142</sup> Notably, Home Office documents categorise and refer to domestic workers as workers. A key requirement under the ODWs visa<sup>143</sup> is that the applicant must have been employed as a domestic worker for one year or more immediately before the application. Similarly, under Schedule 1, Authorised Categories of Employment and Relevant requirements to Regulation 1(2) of the Accession (Immigration and Worker Authorisation) Regulations 2006,<sup>144</sup> domestic workers are unequivocally

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<sup>140</sup> See DTI (now BIS) web archive at [www.dti.gov.uk/employment/pay/national-minimum-wage/](http://www.dti.gov.uk/employment/pay/national-minimum-wage/) last accessed August 23, 2015

<sup>141</sup> Immigration Rule Part 5 (amended by Statement of Changes in Immigration Rules (HC Paper (2010–12) no 1888)

<sup>142</sup> see *Kawago v Dhanji* (unreported) ET 3301758/2007

<sup>143</sup> Immigration Rules para 159A(i-v) as amended by Statement of Changes in Immigration Rules (HC Paper (2012–13) no 565)

<sup>144</sup> SI 2006/3317, London: OPSI

categorised as workers. It follows, that domestic workers in private and diplomatic households *de jure* entitled to be paid in accordance with the NMW. Meanwhile, within s.4 NMWA 1998, the Business Secretary is empowered to add to the list of excluded people under s.3. In addition, under s. 3(2), the Business Secretary is empowered to make regulations that could exclude some category of workers from minimum wage entitlement. The National Minimum Wage Regulations 1999 (“NMWR 1999”)<sup>145</sup> made under the above power, is controversial when it comes to domestic workers. Regulation 2(2) NMWR 1999 excludes domestic workers from the minimum wage entitlement if (1) the employer provides an accommodation for the worker in his/her family home (2) the worker resides in that accommodation (3) the worker is not liable to pay the employer for the accommodation, and (4) the worker, in addition to the accommodation and meals (provided by the employer) shares tasks and leisure activities with the employer.

Applying the principle in *Pepper (Inspector of Taxes) v Hart*<sup>146</sup> to understand the purpose of Reg. 2(2), one would find in the House of Lords debate on the NMWA 1998 (Amendment) Regulations 1999<sup>147</sup> that Baroness Miller asked Lord Sainsbury, the then Minister for Science and Innovation: “[d]uring the passage of the Bill (the NMWA 1998) through both Houses we warned the Government that it would have adverse effects on employment prospects of some vulnerable categories of employees”.<sup>148</sup> To this, Lord Sainsbury replied:

I think we have arrived at a sensible position on this in which **au pairs** will be excluded, but only to the extent that they are **treated as part of a family**, particularly as regards the provision of accommodation and meals and the sharing of tasks and leisure activity.<sup>149</sup>

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<sup>145</sup> SI 1999 / 584, London: OPSI

<sup>146</sup> [1993] A.C. 593; [1992] 3 W.L.R. 1032

<sup>147</sup> HL Deb 02 March 1999 vol. 597 cc1621-32

<sup>148</sup> HL Deb 02 March 1999 vol. 597 c1624

<sup>149</sup> HL Deb 02 March 1999 vol. 597 c1632



Given the above, it appears the exclusion to the NMW was primarily directed at the au pairs who Baroness Miller described as “those who participate in a scheme under which shelter is given in return for work and those participating in a scheme designed to provide training and work experience”.<sup>150</sup> The ‘participation in a scheme’ could be construed to mean that au pairs are not essentially ‘ordinary workers’ but those participating in a program of exchange. Ironically, the law that was initially meant to exclude au pairs from the NMW and encourage cultural exchange, has, by virtue of Reg. 2(2) NMWR 1999 been extended by the Business Secretary to include domestic workers who have nothing to do with cultural exchange but are employed to provide services for wages.

### 3.8 DISCRIMINATION LAW ON DOMESTIC WORKERS

The Equality Act 2010 automatically implies a sex ‘equality clause’<sup>151</sup> in every contract of employment. There are two levels of discrimination when it comes to domestic workers. On the one hand is the failure of the employment and related laws to treat domestic as just any other workers. On the other hand is the treatment of female domestic workers (including in terms of wages) less favourably than their male counterparts. Lord Nicholls, in *Glasgow City Council v Marshall* states of the then Equal Pay Act 1970 c.41:

[A] rebuttable presumption of sex discrimination arise once the gender-based comparison shows that a woman, doing like work or work rated as equivalent or work of equal value to that of a man, is being paid or treated less favourably than the man. The variation between her contract and the man's contract is presumed to be due to the difference of sex. The burden passes to the employer to show that the explanation for the variation is not tainted with sex.<sup>152</sup>

In *Enderby v Frenchay Health Authority*,<sup>153</sup> the CJEU (First Chamber) held, where significant statistics disclose an appreciable difference in pay between two jobs of equal

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<sup>150</sup> HL Deb 02 March 1999 vol. 597 c1625

<sup>151</sup> The Equality Act 2010 c.15, London: OPSI, s. 66(1)

<sup>152</sup> [2000] IRLR 272 HL *at para 339*

<sup>153</sup> (C-127/92) [1994] 1 C.M.L.R. 8 [1994] I.C.R. 112

value, one of which is carried out almost exclusively by women and the other predominantly by men, Article 157 TFEU obliges the employer to show that that difference is based on objectively justified factors unrelated to any discrimination on grounds of sex. Thus, where a national law allows some group of workers such as ODWs to be discriminated upon as in the Reg. 2(2) NMWR 1999 exception, Article 157 TFEU could be invoked by the disadvantaged worker. This assertion is supported by the House of Lords decision in *Regina v Secretary of State for Employment Ex parte Equal Opportunities Commission and Another*,<sup>154</sup> which held an individual could rely on Article 157 TFEU if a legislative provision is in conflict with Community law.<sup>155</sup> Shedding light on discrimination claims, Lord Nicholls in *Shamoon v Chief Constable of the Royal Ulster Constabulary* stated:

In deciding a discrimination claim, one of the matters employment tribunals have to consider is whether the statutory definition of discrimination has been satisfied. When the claim is based on direct discrimination or victimisation, in practice tribunals in their decisions normally consider, first, whether the Claimant received less favourable treatment than the appropriate comparator (the “less favourable treatment” issue) and then, secondly, whether the less favourable treatment was on the relevant proscribed ground (the “reason why” issue). Tribunals proceed to consider the reason why issue only if the less favourable treatment issue is resolved in favour of the Claimant. Thus the less favourable treatment issue is treated as a threshold which the Claimant must cross before the tribunal is called upon to decide why the Claimant was afforded the treatment of which she is complaining.<sup>156</sup>

Thus, it could be argued Reg. 2(2) NMWR 1999 offends against the EC equality law namely Article 157 TFEU and the Equal Treatment Directive (Recast) (2006/54/EC) via Article 13 of the Treaty. The CJEU Grand Chamber has also held in *Küçükdeveci v Swedex GmbH & Co. KG*<sup>157</sup> that a national court is in a position to disregard national legislation and give effect to the EC Employment Equality Framework if the national legislation offends the community non-discrimination principles.

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<sup>154</sup> [1994] 2 W.L.R. 409 (UKHL now UKSC)

<sup>155</sup> See *Marshall v. Southampton and South West Hampshire AHA* [1994] Q.B. 126

<sup>156</sup> [2003] UKHL 11 at para 7

<sup>157</sup> (Case C-555/07) [2010] IRLR 346 ECJ

More so, the CJEU had consistently held the elimination of discrimination based on sex formed part of the fundamental personal human rights, which is one of the general principles of Community law.<sup>158</sup> Notably, in *Marleasing SA v La Comercial Internacional de Alimentacion SA*,<sup>159</sup> the ECJ indicated that national courts could interpret domestic statutory provisions in a way that is compatible with applicable EU directives such as Directive 2006/54/EC. Further, the Code of Practice of the Equalities and Human Rights Commission issued under s.14 Equality Act 2006 as a non-legal guidance has explained that Tribunals and courts are obliged to interpret equal pay law purposefully because the legislation is grounded in European Union law, and in particular treaty provisions that have a broad social purpose.<sup>160</sup> Thus, the ODWs could bring a claim against their employers and the Business Secretary for the discriminatory effect of Reg 2(2) of the NMWR 1999.

Nevertheless, one detriment to the ODWs who intend to rely on Art 157 TFEU in challenging the legality of Reg. 2(2) (a) (ii) before a UK court is that even if an application is accepted by the court, the key issue that the court has to decide is whether Reg. 2(2) (a) (ii) could be justified as a necessary measure. In *Secretary of State for Trade and Industry v Rutherford (No 2)*,<sup>161</sup> the House of Lords held s.109 and s.156 ERA 1996, which imposes an upper age limit of 65 for claims for compensation for unfair dismissal and redundancy pay, did not have an adverse impact on a substantial higher proportion of men than women and therefore did not constitute indirect discrimination on the ground of sex. On this note, it may be argued Reg. 2(2) may not constitute a direct or indirect discrimination on women for two reasons. Firstly, the regulation does not explicitly mention that all live-in domestic workers are excluded from the minimum wage.

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<sup>158</sup> *Defrenne v Sabena* (Case 149/77) [1978] E.C.R 1365

<sup>159</sup> (C-106/89) [1990] E.C.R. I-4135

<sup>160</sup> Equality and Human Rights Commission (2011) *Equality Act 2010 Statutory Code of Practice: Equal pay*, London: HMSO, para 24

<sup>161</sup> [2006] UKHL 19

There are criteria to be satisfied. Secondly, domestic work is not exclusive to women. Men and women are employed, albeit in varying capacities as domestic workers. The recent adjustment to ODWs visas, which allows them a maximum of six months stay in the UK could be relied upon by the Business Secretary as part of measures that has been taken by the Government to ensure the ODWs are not in permanent or long term employment where they would not be entitled to the minimum wage. In cases involving domestic workers, the courts have adopted a narrow interpretation of the law on discrimination to deny domestic workers the opportunity to succeed in race discrimination claims.

Under s.4 of the Equality 2010 Act, the list of protected characteristics includes race. It is also clear within s.9 (1) that race includes colour, nationality, ethnic or national origins as defined in *Mandla v Dowell-Lee*<sup>162</sup>. In two test cases,<sup>163</sup> two ODWs, Ms Taiwo and Ms Onu applied to separate tribunals and averred that they have been badly treated by their employers, and that the bad treatment is as a result of their race, contrary to s.13 Equality Act 2010. Ms Taiwo further claimed indirect discrimination under s.19 of the Act. Although the tribunal initially upheld Ms Onu's race discrimination claim, the decision was reversed by the EAT. Both the direct and indirect race discrimination claims by Ms Taiwo were rejected by a different tribunal and the EAT. According to the EAT, the factual cause of their unfavourable treatment was their vulnerability, which was not indissociably linked with migrant status. The court concluded that no part of their treatment itself was inherently bound up with their race. The EAT decision was upheld by the Court of Appeal in *Onu v Akwivu and Another*.<sup>164</sup> In the court's view, the ODWs were mistreated and discriminated against on the basis of their vulnerability as a result of their immigration status.

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<sup>162</sup> [1982] UKHL 7

<sup>163</sup> *Taiwo v Olaigbe and Another* [2013] I.C.R. 770; [2013] Eq. L.R. 446

<sup>164</sup> [2014] EWCA Civ 279; [2014] WLR (D) 128

In the court's view, such discrimination does not constitute direct or indirect race discrimination because the mistreatment could not be said to be based on the applicants nationality. The implication for the domestic workers is that they may never be able to show that their mistreatment by the employers amount to race discrimination even though it could be argued that immigration status and nationality are intrinsically linked.

### 3.8.1 CASTE DISCRIMINATION – A FORM OF RACE DISCRIMINATION?

Caste discrimination is not specific to domestic workers but, given that some caste are often recruited from mainly Asian countries to work as domestic workers in the UK, it is relevant to discuss this form of discrimination in the light of the approach that UK courts have adopted on race discrimination. The International Convention on the Elimination of all Forms of Racial Discrimination ('ICERD') prohibits discrimination on the grounds of 'descent'. Although caste discrimination has not been specifically proscribed by the Equality Act 2010 (Pyper, 2014), the Secretary of State has the power to amend s.9(5) to make 'caste' a protected characteristic. In fact the Government has made known its intention to carry out a wide public consultation on this issue.<sup>165</sup> In *Tirkey v Chandok and Another*, Case Number ET 3400174/2013, the Claimant who was from a poor rural village in Bihar, India, was employed as a domestic worker for 4 years by the Respondents who were also Indians. But, while the employers were white (lighter skinned and considered a higher caste), the Claimant was from the Adivasi tribe who are known to be dark skinned, poor, and lower caste. The Claimant complained that she was not allowed to sit on the same furniture as the employers, not allowed to share plates and cups with the employers, and that the employers treated her as someone of a lower status to them. Allowing the claim to progress, Judge Sigsworth held 'caste' is part of the protected characteristic of race. While the overall effect of this case is yet unknown, it suffices it that for now, caste are protected in the UK.

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<sup>165</sup> See [https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/85521/caste-discrimination-summary.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/85521/caste-discrimination-summary.pdf). Last accessed August 6, 2015

### 3.9 POST EMPLOYMENT VICTIMISATION AND DOMESTIC WORKERS

Post-employment victimization applies to all workers (Sargeant and Lewis, 2012). Nevertheless, important cases involving domestic workers have shed more lights on the law on post-employment victimization. The key issue in this area is whether a person who is no longer employed could claim victimization against the old employer (Employment Law Bulletin, 2013). Earlier in *Nagarajan v Agnew*<sup>166</sup> the EAT held s.4 (2) of the Race Relations Act 1976 (“‘RRA 1976’”) was couched in the present tense and did not relate back to former employment relationships. This ratio was followed in *Adekeye v The Post Office (No.2)*<sup>167</sup> where the court examined whether at the time of the applicant’ internal appeal she was an “employee” within the meaning of s.4 (2) RRA 1976, and concluded she was not. Held, the terms “employee” and “person employed” in s.4(2) RRA 1976 did not include a person appealing following summary dismissal so that the applicant was not an employee within the meaning of s.4(2) at the time of the appeal hearing. That decision was approved by the Court of Appeal.<sup>168</sup> Nonetheless, in *Coote v Granada Hospitality Ltd.*,<sup>169</sup> the European Court of Justice (“‘ECJ’”), deciding a reference from the EAT in a case of the alleged victimisation of a former employee who had brought a claim of sex discrimination held, the principle of effectiveness meant the court must consider victimization claim whether the victimization occurred during employment or afterwards. In a further development of the law, the House of Lords in *Rhys-Harper v Relaxion Group Plc*<sup>170</sup> unanimously held, overruling *Adekeye*, that courts have jurisdiction to hear discrimination complaints after termination of employment as long as the alleged discriminatory conduct had sufficient connection with the employment relationship.

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<sup>166</sup> [1995] I.C.R. 520; [1994] I.R.L.R. 61 EAT

<sup>167</sup> [1995] I.C.R. 540; [1995] I.R.L.R. 297; Times, February 23, 1995. EAT

<sup>168</sup> *Adekeye v Post Office (No.2)* [1997] I.C.R. 110; [1997] I.R.L.R. 105; (1996) 93(46) L.S.G. 29. CA Civ. Div.

<sup>169</sup> (C-185/97) [1998] ECR I-5199, [1999] I.C.R. 100

<sup>170</sup> [2003] UKHL 33; [2003] 4 All E.R. 1113; [2003] 2 C.M.L.R. 44; [2003] I.C.R. 867; [2003] I.R.L.R. 484

Hence, the House of Lords had effectively extend the words “employer” and “employee” to mean “ex-employer” and “ex-employee”. The decision clearly reflects the spirit of the Council Directive 2000/43/EC<sup>171</sup> of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin that obliges Member States to enact law, which will outlaw all forms of discrimination including victimisation. Unfortunately, rather than making the law clearer, the Equality Act 2010, which reformed and harmonized equality law complicated the law on post-employment victimization. Section 27 of the Act explained that s. 108(7) does not include victimization amongst claims, which could be brought after the end of the employment relationship. Although, the code of practice of the Equality and Human Rights Commission<sup>172</sup> stated at para 9.4 that former workers are protected from victimisation; and at para 10.62 it further stated if the conduct or treatment which an individual received after a relationship has ended amounts to victimisation, this will be covered by the victimisation provisions. But, the code has no similar weight as a statute. For domestic workers, the confusion in the law on victimization became apparent in cases like *Taiwo v Olaigbe*.<sup>173</sup> In that case, the Tribunal was faced with (1) whether it has jurisdiction to hear post-employment victimization claim in the light of s.108(7) of the Equality Act; and (2) to what extent the principle in *Chief Constable of West Yorkshire v Khan* (“Khan’’) <sup>174</sup> could protect employers from victimisation claims. The problem with *Khan* is that it held a subjective test is required while considering why a person accused of victimisation had acted as he had. Thus, an employer who honestly and reasonably believed that he needed to protect his position in pending claims would not be guilty of victimization by failing to provide a reference for the person who had brought the claims.

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<sup>171</sup> OJ L 180, 19.7.2000, p. 22–26

<sup>172</sup> EHRC – *Equality Act 2010 Code of Practice: Employment Statutory Code of Practice*, Equality and Human Rights Commission (2011)

<sup>173</sup> ET/2389629/11; [2012] Eq. L.R 899 ET

<sup>174</sup> [2001] UKHL 48; [2001] 1 W.L.R. 1947

Although that decision was doubted in *St Helens MBC v Derbyshire*,<sup>175</sup> it was not overruled. In *Taiwo v Olaigbe*,<sup>176</sup> the Claimant who was employed as a live-in domestic worker under the ODWs visa, brought a claim for victimization against her ex employers. She alleged that during the ET trials on her previous claims against her ex-employers, the employers forwarded the proceedings file to the UKBA with a view to causing a negative impact on her immigration status. Judge Tsamados who adopted a purposive approach to remedy what he perceived as a simple omission by the drafters under s.108 (7) of the Equality Act, upheld the claim. Held, it could not have been the intention of parliament to exclude post-employment victimisation from the Equality Act. However, in a similar case of *Rowstock Ltd v Jessemey*<sup>177</sup>, a differently constituted tribunal does not reach similar verdict. The tribunal held it had no jurisdiction to give any remedy for post-employment victimisation. Despite the Equality & Human Rights Commission intervening in the appeal to EAT, the court refused to follow the approach taken in *Taiwo v Olaigbe*. Nevertheless, in another domestic workers case of *Onu v Akwiwu*,<sup>178</sup> which also related to post employment victimization, the EAT refused to follow *Rowstock Ltd v Jessemey*. The court observed that there is no sensible purpose of s.108 (7) if there is no right to sue for victimization after the relevant relationship has ended. That is because there would be no need to include Subsection (7) at all – there being no right to sue, conduct amounting to a contravention of Section 108 would, if it was victimised, never give rise to a claim for compensation. Although the court did not follow the approach in *Taiwo v Olaigbe*, where s.108 (7) was interpreted purposefully to give effect to the UK obligation under the EU Directive, the court held that the Equality Act did not prohibit post-employment victimization and that *Rowstock Ltd v Jessemey* had been wrongly decided:

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<sup>175</sup> [2007] UKHL 16; [2007] 3 All E.R. 81; [2007] I.C.R. 841; [2007] I.R.L.R. 540 HL

<sup>176</sup> ET/2389629/11; [2012] Eq. L.R 899 ET

<sup>177</sup> [2013] I.C.R. 807; [2013] I.R.L.R. 439; [2013] Eq. L.R. 438

<sup>178</sup> [2013] IRLR 523; [2013] Eq. L.R. 577; UKEAT/0283/12/RN; UKEAT/0022/12/RN



[t]he fact that there was no express reference to the Race Relations of Equality Acts when uttering threats in respect of proceedings taken to claim for breaches of those Acts does not defeat such a claim. We reject the argument that the Equality Act makes no provision for a Tribunal to have jurisdiction to consider such a claim since the circumstances were said to arise entirely after the relationship had ended. Accordingly, we reverse the findings of discrimination, and hold that there was here actionable victimisation.<sup>179</sup>

The position of the law on post-employment victimization is now clarified by the Court of Appeal in the combined appeal in *Rowstock Ltd v Jessemey*.<sup>180</sup> The Court of Appeal following the House of Lords (now Supreme Court) guideline to interpreting statutes as laid down in *Ghaidan v. Godin-Mendoza*<sup>181</sup> held, post-employment victimization is proscribed by the Equality Act 2010. The importance of this case for domestic workers and for all other workers is that they would be able to hold their employers liable if after the termination of their contract the employer threatens or victimizes them in any way.

### **3.10 EXCLUSION FROM HEALTH AND SAFETY PROTECTIONS**

The Health and Safety at Work etc. Act 1974 (“HSWA”)<sup>182</sup> is the UK legislation that regulates work related health and safety. However, s.51 explicitly states that nothing in the Act shall apply in relation to a person by reason only that he employs another, or is himself employed, as a domestic servant in a private household. Ironically, this legislation did not appear to offend the UK Government obligation within the context of EU law. The Council Directive 89/391/EEC<sup>183</sup> of 12 June 1989 on the introduction of measures to encourage improvements in the safety and health of workers at work stated within Article 3 that a worker shall be interpreted as any person employed by an employer, including trainees and apprentices, but excluding domestic servants.

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<sup>179</sup> *Onu v Akwivu* [2013] Eq. L.R. 577 at para 112 (v – vi)

<sup>180</sup> [2014] EWCA Civ 185

<sup>181</sup> [2004] UKHL 30

<sup>182</sup> 1974 c.37, London: OPSI

<sup>183</sup> OJ 183, 29.6.89, p. 1-8

Although the European Agency for Safety and Health at Work<sup>184</sup> has agreed that occupational safety and health protection of domestic workers and homeworkers should be included within the scope of the European occupational safety and health legislative framework, the lack of concession between Member States has made the inclusion difficult. The exclusion of domestic workers from health and safety protection illustrated a sharp deviation from the Occupational Safety and Health Convention, 1981 (No. 155)<sup>185</sup> that did not specially exclude domestic workers. The ILO has consistently argued that in so far as the convention did not expressly exclude domestic workers, its provisions should apply to them.<sup>186</sup> Since the UK Government did not ratify convention No.155, it is not surprising that the UK health and safety law has conveniently excluded domestic workers from its protections. Further, although the ILO Convention 189 and its accompanying Recommendation 201 set a framework that obliges ratifying member States to ensure the health and safety of domestic workers are protected, as the UK is yet to adopt this framework for the fear that it contradicts s.51 of HSWA, the wellbeing of the domestic workers in the UK is very much at a high risk.

### 3.11 ONEROUS WORKING CONDITION

Under the Working Time Council Directive 93/104/EC<sup>187</sup> of 23rd November 1993 as amended by the Working Time Directive 2003/88/EC,<sup>188</sup> each Member States are obliged to ensure that workers are protected against adverse effects on their health and safety that can be caused by excessively long working hours, inadequate rest or disruptive working patterns.

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<sup>184</sup> See European Agency for Safety and Health at Work (2003), *Gender issues in safety and health at work — A review*, Luxembourg: Office for Official Publications of the European Communities, 2003

<sup>185</sup> ILO – *Occupational Safety and Health Convention, 1981 (No. 155)*, Convention concerning Occupational Safety and Health and the Working Environment, 67th ILC session (22 Jun 1981), Geneva: ILO

<sup>186</sup> ILO – Office of the Legal Adviser, *Legal Opinion of 29 July 2002* cited in ILO - *Decent work for domestic workers*, International Labour Conference, 99th Session, 2010, Report IV(1), Fourth item on the agenda, Geneva: International Labour Office, p.16

<sup>187</sup> Official Journal L 307, 13.12.93, p. 18 – 24

<sup>188</sup> Official Journal L 299, 18/11/2003 P. 0009 – 0019

[T]he ILO Constitution and its first standard, the Hours of Work (Industry) Convention, 1919 (No. 1), identify 48 hours as the acceptable limit for a normal working week. During the Depression of the 1930s, a new international instrument on working hours was adopted, the Forty-Hour Week Convention, 1935 (No. 47), which introduced a limit ultimately adopted as the ILO's vision of acceptable working hours. These two international labour instruments dominated the legal landscape of the twentieth century, which witnessed a gradual reduction in standard working hours to a 40-hour week.<sup>189</sup>

It is obvious from the above that the internationally acceptable working hours are a maximum of 48 hours per week. However, there are evidences to suggest most live-in domestic workers work in excess of 48 hours a week (Kalayaan, 2012, HRW, 2014). Although, within Article 17 of the Working Time Directive 2003/88/EC, Member States can derogate, in particular in the case of family workers. But, there is nothing within the directive that equates family workers to domestic servants. However, the UK law on working conditions, which purport to implement Directive 2003/88/EC excludes domestic workers from some of its provision. The UK Government own webpage<sup>190</sup> has asserted that domestic workers in private households (e.g. Cleaner or au pair) are not entitled to rest breaks for health and safety reasons. No further explanation is provided as to why this is the case. It is also unclear whether the reference to 'cleaners and au pair' relates to domestic workers. More importantly, under Regulation 19 of the Working Time Regulation 1998 (as amended) (WTR 1998)<sup>191</sup> domestic workers are explicitly excluded from the following rights:

- (1) Regulation 4 – Maximum weekly working time: The provision that a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days.
- (2) Regulation 6 – Length of night work:
  - (i) The provision that night work shall not exceed an average of eight hours for each 24 hours.
  - (ii) The obligation on the employer to take all reasonable steps, in keeping with the need to protect the health and safety of workers

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<sup>189</sup> See ILO - *Decent work for domestic workers*, International Labour Conference, 99th Session, 2010, Report IV(1), Fourth item on the agenda, Geneva: International Labour Office, p.48

<sup>190</sup> <https://www.gov.uk/rest-breaks-work/types-of-break> last accessed August 12, 2015

<sup>191</sup> SI 1998 / 1833, London: OPSI

- (3) Regulation 7 – Health assessment and transfer of night workers to day work: The obligation on the employer not to assign the worker to work at night except where necessary and where adequate health and safety steps have been put in place
- (4) Regulation 8 – Pattern of work: The obligation on the employer not to do anything that would put the health and safety of the worker at risk.

Meanwhile the legal effect of Reg. 19 has been tested in both national and international (EU) jurisprudence. In *Sindicato de Medicos de Asistencia Publica (SIMAP) v Conselleria de Sanidad y Consumo de la Generalidad Valenciana*,<sup>192</sup> the CJEU granted a declaration stating that doctors working in primary health care fell within the scope of the Council Directive 93/104/EC even though they were excluded by the drafters within the Directive' Article 1(3). This principle was applied by the Court of Appeal in *Gallagher v Alpha Catering Services Ltd (t/a Alpha Flight Services)* <sup>193</sup> where it held that airline catering staff are entitled to rest break.

The majority of live-in domestic workers work on call and may not have a fixed period of rest break (Kalayaan, 2014). In *Hughes v Corps of Commissionaires Management Ltd* <sup>194</sup> the Claimant who was employed as a security guard brought an ET claim against his employer. He averred that his breaks were often interrupted as he remained on call and as such, was not receiving rest breaks under Reg. 12 or compensatory rest under Reg. 24 (a) of the WTR 1998. The dismissal of his claim by the ET was upheld by both the EAT and the Court of Appeal. In the court view, there could be certain circumstances where an employer may not be able to give full rest break to employees, if the employer could offer an equivalent period of compensatory rest, which need not be a rest break as defined under Reg.24 (a), such rest break could defeat a claim under Reg. 24(b).<sup>195</sup> The implication for domestic workers is that they may not be able to bring a successful claim against their employers if the employers put them on call.

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<sup>192</sup> (C-303/98) [2001] All E.R. (EC) 609

<sup>193</sup> [2004] EWCA Civ 1559

<sup>194</sup> *Hughes v Corps of Commissionaires Management Ltd* [2011] I.R.L.R. 100 EAT

<sup>195</sup> *Hughes v Corps of Commissionaires Management Ltd* [2011] EWCA Civ. 1061

## 3.12 DISPUTES RESOLUTION AND THE DOMESTIC WORKERS

At any point, there could arise problems in the contractual relationship between the employer and employees (Du Toit, 2000). Disputes relating to terms of engagement, ill fulfilment of the terms, and other related matters could occur. As such, the employment law should be able to deal with these negative events (Honeyball, 2014).

### 3.12.1 CURTAILMENT OF LEGAL AID AND THE REMOVAL OF GRANTS

In the face of economic downturn, various cuts were made to Government expenses. The Legal Aid and Sentencing and Punishment of Offenders Act 2012 ('LASPOA'),<sup>196</sup> which came into force in April 2013, removed legal aid funding for civil law cases including all immigration matters, but allowed exception for mental health, asylum, trafficking, discrimination, domestic violence, debt and housing matters where someone's home is at immediate risk. The funding curtailment also resulted in the Local Government cutting down on expenses and grants, which include grants to the local law centres.<sup>197</sup> Law centres that have over the past 40 years been providing quality legal advice,<sup>198</sup> casework and representation to vulnerable individuals and groups, including domestic workers have become a victim of double financial cuts and most of the centres around London have now closed. One of such law centres challenged the decision of its local Government to withdraw funding from it, but failed as the Court of Appeal held there is nothing legally wrong in the way the local council has reached its decision to withdraw funding.<sup>199</sup> The curtailment makes it difficult for migrants and low skilled workers in particular to access justice (Cookson, 2011).

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<sup>196</sup> 2012 c.10, London: OPSI

<sup>197</sup> See [https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/f](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/f) last accessed August 17, 2015

<sup>198</sup> See House of Common Debates: Virendra Sharma MP, HC Deb, 24.1.2012, [c68WH](#)

<sup>199</sup> *R(Greenwich Community Law Centre) v Greenwich LBC* [2012] EWCA Civ 496

Although NGOs like Kalayaan continues to provide some financial support to the ODWs, the resources and capability of Kalayaan, a charity, to continue funding ODWs' ET claim is doubtful. It is acknowledged that some domestic workers who are victim of trafficking have since July 2011 been receiving some kind of supports from the Salvation Army under a Government contract, the ability of the Salvation Army to fund claims such as non-payment of wages, unlawful deduction in wages, and unfair dismissal that are not entirely linked to trafficking is doubtful. Nonetheless, the good news for those who have been trafficked for domestic servitude is that, if they could argue a refusal to fund their claims would go against their rights under article 6 and/or 8 of the ECHR, or Article 47(3) of the Charter of Fundamental Rights, they could apply for legal aid under the exceptional clause in s.10 (3) LASPOA. In *R (Gudanaviciene and Others) v Director of Legal Aid Case Work and Lord Chancellor* [2014] EWHC 1840 (Admin), Collins J whose decision was substantially upheld by the Court of Appeal in *R (Gudanaviciene and Others) v Director of Legal Aid Case Work and Lord Chancellor* [2014] EWCA Civ 1622 held the Lord Chancellor's Guidance for determination of applications for exceptional funding in civil cases was unlawful and that s.10(3) (a) LASPOA required a grant of legal aid in cases where failure to provide such legal aid would constitute a breach of the ECHR and/or EU law.

### 3.12.2 NEW RULES ON UNFAIR DISMISSAL CLAIMS

Under a new amendment introduced by s.2 of the Employment Tribunals Act 1996 (Tribunal Composition) Order 2012,<sup>200</sup> to s.4(3) ETA 1996 a single judge would hear proceedings in respect of unfair dismissal claims. Although the parties will be able to request a tripartite panel, such request will be accepted or rejected at the judge's discretion.

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<sup>200</sup> SI 2012/988, London: OPSI

The implication for the ODWs who usually present with complex cases <sup>201</sup> and whose employment contracts are usually down to the word of mouth is that a single Judge alone might not be in a better position to hear and determine their claims on highly contentious facts. Furthermore, before 6<sup>th</sup> April 2012, Section 108(1) of ERA 1996, which was substituted on 1<sup>st</sup> June 1999 by article 3 of SI 1999/1436 provided that the qualifying period of employment to bring an unfair dismissal claim is one year from the date of commencement of the employment. But, Article 3 of the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012,<sup>202</sup> which came into effect on 6<sup>th</sup> April 2012 amended the qualifying period for unfair dismissal to the extent that potential Claimants must now show that they have been employed for a minimum period of two years. According to the Government, “this will lead to a reduction of around 2,000 claims per annum, which brings net direct benefits to employers of around £4.7m per annum”.<sup>203</sup> Whilst the Government position is economically viable, and may sound as a good news to employers, the uncalculated impact on the ODWs is a flagrant disregard for their human rights.

More so, since the new ODWs admitted to the UK from 6<sup>th</sup> April 2012 are allowed a maximum period of 6 months residency, there is no meaningful way in which they could accrue the 2 years unfair dismissal period. The good news for ODWs whose ET claims often involve disputes on the entitlement to the minimum wage, especially concerning the minimum wage exclusion under Reg. 2(2) NMWR 1999; is that section 104A (1) of ERA 1996 makes it automatically unfair if the principal reason for dismissal is that the ODW asserts or seek to assert a statutory right. In this instance, the 2 years continuous period of employment will be disregarded.

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<sup>201</sup> See for instance: *Nambalat v Taher* [2012] EWCA Civ 1249; *Onu v Akwivu* [2013] Eq. L.R. 577; *Taiwo v Olaigbe* [2013] Eq. L.R. 446

<sup>202</sup> SI 2012 No. 989, London: OPSI

<sup>203</sup> BIS: *Employment Law Review Annual Update 2012*, page 9, para 2.5, London: Department of Business Innovation and Skills

However, the fact that the ODWs would have to return to their home country, cannot change employers in the UK, and might not even know their rights, make the automatic dismissal advantage indifferent to easing their problems.

### 3.12.3 PAY TO ACCESS LEGAL SERVICES

Since the establishment of the Industrial Tribunal in 1964, it has been free at the point of service such that potential Claimants do not have to pay any charge (CAB, 2013). According to a research conducted by the Ministry of Justice in England and Wales, people are more worried about how stressful or long their court case would be than about the potential costs of the case.<sup>204</sup> Perhaps this conclusion led to the changes introduced by Her Majesty's Courts and Tribunals Services (HMCTS), which is responsible for the ET and the EAT to the extent that fees are payable to the tribunals with effect from 29<sup>th</sup> July 2013.<sup>205</sup> Under the two-level fee structure that was introduced to ET claims,<sup>206</sup> claims that are categorised under level one are generally low-level straightforward claims for sums due on termination of employment, e.g. unpaid wages, payment in lieu of notice, redundancy payments. The Claimant will pay £160 issue fees and a subsequent £230 some 4-6 weeks before the full hearing date. Level two claims include those relating to unfair dismissal, discrimination complaints, equal pay claims and claims arising under the Public Information Disclosure Act. In this category, the Claimant will pay £250 issue fees and a subsequent £950 some 4-6 weeks before the full hearing date. For Appellants intending to bring a claim in the EAT, a fee of £1600 is payable. £400 would be paid to lodge the appeal whilst the remaining £1200 is payable before the appeal hearing. In addition to claims and appeals, it will cost £100 (level 1 and level 2 claims inclusive) to ask the court to review a default judgment.

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<sup>204</sup> Ministry of Justice (2007) *What's cost got to do with it? The impact of changing court fees on users*, Ministry of Justice Research Series 4/07, Opinion Leader Research, [Ministry of Justice, June 2007](#)

<sup>205</sup> Ministry of Justice (2012) *Charging Fees in Employment Tribunals and the Employment Appeal Tribunal Summary of responses*, [Response to Consultation CP22/2011](#), 13 July 2012, p.61

<sup>206</sup> See <http://www.justice.gov.uk/downloads/tribunals/employment/et-fees-factsheet.pdf>. Last accessed August 17, 2015



Where a claim has been instituted but the parties managed to reach a settlement before the hearing, the money paid on application will not be reimbursed. In this instance, an application to have the claim dismissed (be it level 1 or level 2) will cost £60. Under the new system, the ET is able to offer judicial mediation on complex cases that is most likely to last 3 days or more. In this instance, if the employer (Respondent) agrees, it will be required to pay the cost of £600. Anyone wishing to raise a counterclaim in a level 1 claim will have to pay £160. Application for a review of the ET decision in a level one claim will cost £100; whereas a fee of £350 is payable on an application for a review of the level 2 decision. The ET may make a cost order for the unsuccessful party to reimburse the successful party. Whilst the introduction of fees to ET claims could sound like good news to employers, and in practice reduce the volume of the workload of the ET, it could potentially restrict access to justice for many low pay workers including the ODWs. ODWs visas forbid the bearer from claiming state benefits, which could have entitled them to receive fee waiver status as low income workers. A failed challenge to the Employment Tribunals and the Employment Appeal Tribunal Fees Order 2013 (SI 2013/1893) was mounted by the Unison, a workers union. The trade union applied for permission to apply for judicial review of the Lord Chancellor's decision to introduce the statutory instrument, and applied for an interim injunction staying implementation of the Order. The Order had been brought into force on the date of the instant application. At the initial stage, Lewis, J., granted the application for permission to appeal but the judge refused the application for an interim injunction.<sup>207</sup> However, in the judgement delivered on 7<sup>th</sup> February 2014, Lord Justice Moses and Mr Justice Irwin dismissed the trade union's appeal. It follows that, as it stands, fees by prospective Claimants would be payable to the Tribunal; a disadvantage to domestic workers who are not allowed to access public fund, and who are unable to instruct paid solicitors.

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<sup>207</sup> *R. (on the application of Unison) v Lord Chancellor Queen's Bench Division* [2013] EWHC 2858 (Admin)

#### 3.12.4 THE DILEAMMA WITH DEPOSIT ORDER

Within s.21 of the Enterprise and Regulatory Reform Act 2013,<sup>208</sup> the ET is empowered to make a deposit order against a specific part of a claim or response. This is not good for the ODWs who are often assisted by voluntary organisations. Further, the Employment Tribunals (Increase of Maximum Deposit) Order 2012<sup>209</sup> made under section 9(3) of the Employment Tribunals Act 1996 provides that, when a judge at the ET considers that a claim has a limited chance of success, the judge could increase the maximum limit at which deposit orders can be made from £500 to £1,000. This increment, which is designed to do away with vexatious Claimants, could technically hinder access to justice for the ODWs who often present with few documented facts and whose ET claims usually rely on the word of mouth.

#### 3.13 ALTERNATIVE DISPUTES RESOLUTION AND THE ODWs

The legal provisions that are relevant to dispute resolution are covered under the Trade Union and Labour Relations (Consolidation) Act 1992 (“TULRCA 1992”)<sup>210</sup> as amended by the Trade Union and Labour Relations (Consolidation) Act 1992 (Amendment) Order 2013.<sup>211</sup> Most employment-related dispute resolution is managed by the Advisory, Conciliation and Arbitration Service (“ACAS”) established under the Employment Protection Act 1975<sup>212</sup> as a statutory body. ACAS, which aims to give impartial and confidential advice and offer arbitration between the employers and the employees is largely funded by the Department for Business, Innovation and Skills (“BIS”) but, it has remained a non-departmental body and governed by an independent Council that includes representatives nominated by both the Confederation of British Industry (“CBI”) and the Trades Union Congress (“TUC”).

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<sup>208</sup> 2013 c.24, London: OPSI

<sup>209</sup> SI 2012/149, London: OPSI

<sup>210</sup> 1992 c.52, London: OPSI

<sup>211</sup> SI 2013/763, London: OPSI

<sup>212</sup> 1975 c.71, London: OPSI

Of the 57,737 jurisdictional Complaints lodged with ET in January to March 2013, only 27,778 were disposed.<sup>213</sup> To reduce ET workload, the Government enacts the Enterprise and Regulatory Reform Act 2013.<sup>214</sup> Section 7 of the Act, which inserts section 18A into s. 18 of the Employment Tribunals Act 1996 c.17 states at ss.1 that, before a person (“the prospective Claimant”) presents an application to institute relevant proceedings relating to any matter, the prospective Claimant must provide to ACAS, all the information about the matter. If the ACAS cannot help the parties to reach settlement, it will issue a certificate under s.18A (4) to that effect. Without this certificate, the aggrieved person cannot file a claim with the ET. Nevertheless, whilst it is accepted that alternative dispute resolution is good, when it comes to ODWs the employers are often not in the position of compromising until and after a proceeding in the ET has been instituted.

### 3.14 THE DOCTRINE OF ILLEGALITY – A BARRIER TO JUSTICE?

#### 3.14.1 INTRODUCTION TO THE DOCTRINE

The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this; *ex dolo malo non oritur actio*. No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causâ*, or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the Court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff.<sup>215</sup>

The above classic statement of Lord Mansfield CJ in the Court of King's Bench case of *Holman v Johnson* explicitly laid down the essence of the doctrine of illegality. This doctrine

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<sup>213</sup> Ministry of Justice (2013) *Tribunals Statistics Quarterly 1 January to 31 March 2013, 20 June 2013*, p.11 [https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/207857/tribunal-stats-q4-2013.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/207857/tribunal-stats-q4-2013.pdf) last accessed August 3, 2014

<sup>214</sup> 2013 c.24, London: OPSI

<sup>215</sup> *Holman et al.' v Johnson, alias Newland* [1775], 98 Engl. Rep. 1120 (1. Cowp. 341) at 343

is a trite English (contract, tort, or trust) law often relied upon by the Courts to deny any petitioner seeking to enforce a right that is wholly or partly based on an illegal activity. In essence, the doctrine requires that the applicant present with a clean hand.<sup>216</sup> The defence of illegality literally affords the defendant an equitable defence where that applicant has acted unethically, illegally, or in bad faith. The doctrine, which is a very strict law that is based upon public policy<sup>217</sup>, does not ensure justice *per se*, but prevents the court system from being abused.<sup>218</sup> Hence, this doctrine creates a tension between on the one hand, the need to maintain the Court's integrity and on the other hand, the need to ensure justice; especially where a strict adherence to the principle would manifestly deny justice to the less guilty party. Fry LJ in *Kearley v. Thomson*<sup>219</sup> stated that “as a general rule, where the plaintiff cannot get at the money which he seeks to recover without showing the illegal contract, he cannot succeed. In such a case, the usual rule is *potior est conditio possidentis*.”<sup>220</sup> It follows that, where a claim cannot stand out without relying on an illegal act or activity, that claim would be defeated with illegality. However, “an illegal performance would not necessarily render a legal contract unenforceable”.<sup>221</sup> The distinction between an illegal contract and the illegal performance of a legal contract was highlighted in *St. John Shipping v. Joseph Rank Ltd*<sup>222</sup> – approved by the Court of Appeal in *Shaw v. Groom*.<sup>223</sup> Devlin J, delivering judgment for the Claimant highlighted the principles of illegal contract:<sup>224</sup>

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<sup>216</sup> The general rule is laid down by the Lord Chief Justice in *Collins v. Blantern* 1 Sm.L.C. 7<sup>th</sup> ed. 369 is that: “Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of the Court to fetch it back again; you shall not have a right of action when you come into a court of justice in this unclean manner to recover it back.”

<sup>217</sup> See [http://lawcommission.justice.gov.uk/docs/cp154\\_Illegal\\_Transactions\\_Consultation.pdf](http://lawcommission.justice.gov.uk/docs/cp154_Illegal_Transactions_Consultation.pdf) last accessed August 17, 2015

<sup>218</sup> See *Tinsley v Milligan* [1994] 1 AC 340 Per Lord Goff at p.355

<sup>219</sup> (1890) 24 Q.B.D. 742 CA (Civ Div)

<sup>220</sup> (1890) 24 Q.B.D. 742 at 745

<sup>221</sup> *Wells v Hopwood* 110 E.R. 82, (1832) 3 Barnewall and Adolphus 221 at 225- 226

<sup>222</sup> [1957] 1 QB 267

<sup>223</sup> [1970] 2 QB 504 CA (Civ Div)

<sup>224</sup> *St. John Shipping v. Joseph Rank Ltd*. [1957] 1 QB 267 at 283

- (1) The first is that a contract which is entered into with the object of committing an illegal act is unenforceable. The application of this principle depends upon proof of the intent, at the time the contract was made, to break the law; if the intent is mutual the contract is not enforceable at all, and, if unilateral, it is unenforceable at the suit of the party who is proved to have it.
- (2) The second principle is that the court will not enforce a contract which is expressly or impliedly prohibited by statute. If the contract is of this class it does not matter what the intent of the parties is; if the statute prohibits the contract, it is unenforceable whether the parties meant to break the law or not.

In *Saunders v Edwards*,<sup>225</sup> Bingham LJ stated at para 1134 that “on the whole the courts have tended to adopt a pragmatic approach to these problems, seeking where possible to see that genuine wrongs are righted so long as the court does not thereby promote or countenance a nefarious object or bargain which it is bound to condemn”. Here, the court developed the ‘public conscience test’, which allowed the doctrine of illegality to be seen as a more flexible rather than a rigid instrument. This flexible approach was adopted by the Court of Appeal in *Tinsley v Milligan*<sup>226</sup> and upheld by the House of Lords.<sup>227</sup> However, Lord Goff with whom Lord Keith agreed mentioned in dissenting statement that the public conscience test is an affront to the established law on illegality and cautioned that if there was any need to change the law that would be a matter for the Parliament. He concluded that the Law Commission may be tasked to foresee the task of investigating the need for a change in the law.<sup>228</sup> In any event, *Tinsley v Milligan* has remained the current law on modern doctrine of illegality.

### 3.14.2 EXCEPTION TO THE ILLEGALITY RULE

The Employment Appeal Tribunal (EAT) had the opportunity to decide the exception to illegality in *Leighton v Michael*.<sup>229</sup> The court distinguished the fact in the case from the existing law of illegality because, even though the contract is tainted with illegality, the claim in sex discrimination does not derive from the contract but from statute.

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<sup>225</sup> [1987] 1 W.L.R. 1116

<sup>226</sup> *Tinsley v Milligan* [1992] Ch. 310

<sup>227</sup> [1994] 1 A.C. 340 (UKHL now Supreme Court)

<sup>228</sup> [1994] 1 A.C. 340 UKHL at 364

<sup>229</sup> [1995] I.C.R 1091; [1996] IRLR 67CA Civ Div.

More importantly, the court held that the contract in this case was not tainted with illegality because the Claimant unlike in *Tomlinson v. Dick Evans U Drive*, was not a willing party to the deceit perpetrated by her employer to defraud the HMRC. In *Hall v Woolston Hall Leisure Ltd.*,<sup>230</sup> a case which approved *Leighton v Michael*, the Court of Appeal differentiated between a contract that is illegal *ab initio* from a contract that is illegally performed.<sup>231</sup> The court held the illegality in the performance of the contract in this case concerned only the means by which wages were paid and there was no causal link between the Claimant's acquiescence in that matter and her complaint of sex discrimination. In the court's opinion, Council Directive 76/207 EEC (OJ L 39 of 14.2.1976) unambiguously guaranteed the principle of fair treatment between men and women with regard to working conditions. Thus, despite the illegality in the performance of the contract, the Court is under a duty to interpret the national law so as to give effect to the Directive and provide an effective remedy. However, in *Vakante v Addey and Stanhope School Governing Body*,<sup>232</sup> the Claimant who had obtained employment by committing immigration crime, sought to rely on the Council Directive 2000/43 that implemented the principle of equal treatment between persons irrespective of racial or ethnic origin in his race discrimination claim. The Court of Appeal rejected the claim. In the view of the Court, the Claimant criminality means that his contract of employment, which is intrinsically linked to his claim of racial discrimination, is void *ab initio*.

As for the illegal conduct here (a) it was that of the applicant; (b) it was criminal; (c) it went far beyond the manner in which one party performed what was otherwise a lawful employment contract; (d) it went to the basic content of an employment situation-work; (e) the duty not to discriminate arises from an employment situation which, without a permit, was unlawful from top to bottom and from beginning to end.<sup>233</sup>

<sup>230</sup> [2001] 1 W.L.R. 225; [2000] 4 All E.R. 787; [2001] I.C.R. 99; [2001] 1 W.L.R. 225 (CA (Civ Div))

<sup>231</sup> See also *Wheeler v Qualitydeep Ltd (t/a Thai Royale Restaurant)* [2004] EWCA Civ 1085; [2005] I.C.R. 265

<sup>232</sup> [2004] EWCA Civ 1065; [2004] 4 All E.R. 1056; [2005] I.C.R. 231; [2005] 1 C.M.L.R. 3

<sup>233</sup> [2005] 1 C.M.L.R. 3 per Lord Justice Mummery at para 34

On the question of EC law, the court held that the Claimant is unable to rely on the Directive because the Race Relations Act 1976 (Amendment) Regulations 2003 that implemented it was yet to come into force, and there is nothing in the instance that could allow the court to apply the law retrospectively. It appears this case has been decided on public policy ground because the Court of Appeal in *Ashmore, Benson, Pease & Co v Dawson* <sup>234</sup> held that where a Claimant is aware that the performance of a legal contract he/she is about to make would be by illegal means, that Claimant would not be able to enforce the contract. It follows that if the Claimant's claim is so close or clearly connected with or inextricably bound up with illegal conduct, the Courts would reject the claim.

### 3.14.3 DOCTRINE OF ILLEGALITY AND THE DOMESTIC WORKERS

In *Zarkasi v Anindita*,<sup>235</sup> the Claimant, Zarkasi, who was employed from Indonesia as a living-in domestic worker, had travelled to resume her role in the UK on a false passport. Throughout her employment in London, she was paid below the minimum wage. After completing an agreed two years' service with the employer, she asked to return to Indonesia but the employer wanted her to stay longer. She left the employer and brought ET claims of unfair dismissal, unlawful deduction of wages and discrimination. The Respondents' argument that the claim was tainted with illegality was accepted by the ET who dismissed the non-discrimination claims on the ground that the Claimant had come to the UK voluntarily and that she knew she was working illegally. Although the ET accepted the Claimant was trafficked into the UK and that her discrimination claim was not intrinsically linked with the illegality, but the claim was dismissed on the ground that the discrimination was as a result of the Claimant immigration status rather than on her race. The Claimant appealed on the ground that the tribunal ought to have had regard to the provisions of the Council of Europe Convention on Action against Trafficking in Human Beings when considering the

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<sup>234</sup> [1973] 1 W.L.R. 828

<sup>235</sup> [2012] I.C.R. 788

issue of illegality and to have held that even though the contract was unlawful it was capable of being enforced by the tribunal if the Claimant was found to be a victim of trafficking. That averment was rejected by the EAT. Held, it is clear from the judgement of the House of Lords (now Supreme Court) judgment in *R. v Secretary of State for the Home Department Ex p. Brind* <sup>236</sup> that international law does not become part of English law until implemented by Statute; and where the wording of the a statute is clear and unambiguous, the court ought to give effect to it. In this instance, the relevant statute is s.24 of the Immigration Act 1971 which preclude the Claimant from working in the UK illegally. Since the Claimant' contract of employment was *void ab initio*, she was unable to rely on it. Similarly, in *Hounga v Allen & Anor* [2014] UKSC 47, the Supreme Court overturned the Court of Appeal decision in *Hounga v Allen & Anor* [2012] EWCA Civ 609 that had held the discrimination claim by a ODWs who has worked in the UK illegally was tainted with illegality. The Claimant, Ms Hounga, was a young Nigerian national aged 15 years when she was trafficked to the UK to work as a house help. Whilst in the UK, she suffered serious physical abuse at the hand of the Respondent. Upon her dismissal, she brought a claim for unfair dismissal, unpaid wages and holiday pay, and discrimination. The ET dismissed her non-discrimination claim on the ground that the established public policy principle of illegality prevented her from relying on the illegal contract. The ET was also satisfied that the Claimant willingly participated in the immigration fraud that led to her being trafficked into the UK. Although the ET upheld her discrimination claim, that decision was overturned by the EAT <sup>237</sup> before it was reinstated by the Supreme court. The implication for domestic workers is that if they work without a clear authorisation such as ODWs visa, they would be taken to have worked illegally and their contract, if any, would be declared *void ab initio*.

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<sup>236</sup> [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1991] 1 All E.R. 720; (1991) 3 Admin. L.R. 486

<sup>237</sup> *Allen v Hounga* [2011] Eq. L.R. 569



As obvious in the Houna case, it would not matter even if the worker has been trafficked for domestic servitude. Nevertheless, it is notable that in *Tinsley v Milligan*, Lord Goff<sup>238</sup> mentioned the need for the Law Commission created under the Law Commissions Act 1965,<sup>239</sup> to review the existing laws on illegality. Thus, for long, the Law Commission that accepts the law on illegality is complex, uncertain, arbitrary and occasionally unjust, has been undertaking a long-running project into its reform.<sup>240</sup> A report published by the Law Commission on 17<sup>th</sup> March 2010, "The Illegality Defence", which included a draft Bill, recommended a statutory reform on the aspect of the law on trust, but considered no further legislation in the areas of contract, unjust enrichment and tort.<sup>241</sup> Although the recommendation was rejected by the Government, the fact that the Commission recommended that judges should be allowed to deal with the issue of illegality as it affects contract and tort, not minding the doctrine of *stare decisis*, there is bound to be a degree of variations in the judges' decision, which should rely on the facts in each case. In *ParkingEye v Somerfield Stores Limited*, Sir Robin Jacob stated:

Illegality and the law of contract is notoriously knotty territory. Etherton LJ put it this way in the most recent case on the subject to reach this court, *Les Laboratoires Servier v Apotex Inc* [2013] Bus LR 80, decided after the judgment below in this case, at para. 63: It is not necessary in order to resolve this appeal to undertake a comprehensive analysis of the decided cases. Such an exercise would in any event be complex, very lengthy and in large part unrewarding. The decisions inevitably turn on their own particular facts. The statements of law or principle they contain are not all consistent or easily reconciled. The jurisprudence in this area has been an evolving one, but its evolution has not followed a consistent pattern.<sup>242</sup>

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<sup>238</sup> *Tinsley v Milligan* [1994] 1 A.C. 340 at 364

<sup>239</sup> 1965 c.22, London: OPSI

<sup>240</sup> See (1) The Law Commission (1999) *Illegal Transactions: The Effect of Illegality on Contracts and Trusts*, Consultation Paper 154, (1999); (2) *The Illegality Defence in Tort* (2001) Consultation Paper No 160; (3) [Law Commission's Consultative Report](#) [Law Commission, *The Illegality Defence: A Consultative Report* (Law Com CP 189, 2009)].

<sup>241</sup> See The Law Commission (LAW COM No 320), *THE ILLEGALITY DEFENCE*, HC 412, London: The Stationery Office, 16<sup>th</sup> March 2010

<sup>242</sup> *ParkingEye v Somerfield Stores Limited* [2012] EWCA Civ 1338; [2013] 2 W.L.R. 939 CA (Civ Div) at 945

In the view of Sir Robin Jacob, it is irrelevant and time wasting to perform a comprehensive review of the decided cases on illegality, because the principle they contain are confusing. “The starting point for an examination of the law in this area is the two Law Commission papers on the subject, the Consultation Paper No 189 (2009) and the final Report (2010) (Law Com No 320) entitled *The Illegality Defence* ”.<sup>243</sup> According to Sir Jacob, the Law Commission was not prepared to accept that the law on illegality was in a “straightjacket that once it was shown illegal performance of any sort was intended at the time of the making of the contract, unenforceability would follow automatically”.<sup>244</sup> The judge concluded that rather than surfing and aligning case laws that best support a particular position, the best way to deal with illegality cases is to go back to the basics of illegality and apply the facts on a case-by-case basis. This would require the court to look into the contract and examine if it is illegal *ab initio*. If the answer is yes, then the claim is barred. If the contract is legal but the performance of it is illegal, then the correct test that applies is “whether the method of performance chosen and the degree of participation in that illegal performance is such as to ‘turn the contract into an illegal contract’”.<sup>245</sup> Accordingly, a claim should not be barred just because it contains an element of illegality. Going by this analysis, one can only conclude that the Court of Appeal decision in *Hounga v Allen* may have not been properly considered. The court should have examined the extent of the illegality and the involvement of the parties in the illegality in order to arrive at a just and proportionate decision.

### **3.15 DIPLOMATIC IMMUNITY AS A BARRIER TO JUSTICE**

In the UK, immunity from court jurisdiction is a quintessential part of common law that has been incorporated into Statute by the Crown Proceedings Act 1947.<sup>246</sup> International laws

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<sup>243</sup> *ParkingEye v Somerfield Stores Limited* [2013] 2 W.L.R. 939 CA (Civ Div) at 946

<sup>244</sup> *ParkingEye v Somerfield Stores Limited* [2013] 2 W.L.R. 939 CA (Civ Div) at 946

<sup>245</sup> *B and B Viennese Fashions v Losane* [1952] 1 All ER 909, per Jenkins LJ at 913

<sup>246</sup> 1947 c. 44 (Regnal. 10\_and\_11\_Geo\_6), London: OPSI

take centre stage when it comes to the UK's relationship with foreign countries and foreign dignitaries (Barnett, 2012). The international legal framework for States and States' Representatives (diplomatic staff and consular personnel) immunity is contained within the customary international law and international treaties.<sup>247</sup> Article 38(1) of the Statute of the International Court of Justice 1946 provides that international convention; custom and the general principles of law recognised by civilised nations shall be relevant in deciding disputes on immunity. Customary International Law is thought to have evolved from the consistent practices of States and norms that are widely acceptable as standard of engagement (Goldsmith and Posner, 1999). Such that, what is considered a wrong practice in one State should be considered a wrong practice in other States (Guzman, 2008). Thus, the essence of Immunity is to ensure a sound reciprocal diplomatic relation to ensure States trade at arm's length and with consistency (Chatterjee, 2008). While on official duties, Envoys are excluded from the jurisdiction of the receiving countries to allow them to carry on their duties without any fear of litigation. These instruments have been implemented by the UK <sup>248</sup> and have become applicable in UK courts (Brook, 2008; Locke, 1821). Articles 22, 24, and 27 of the Vienna Convention on Diplomatic Relation ("VCDR 1961") oblige receiving States to take active steps to protect the properties and communication facilities of foreign missions. Under Articles 29-36, diplomatic staffs are privileged and immune from State jurisdiction. However, Article 32 provides that immunity from jurisdiction under Article 37 may be expressly waived by the sending States.

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<sup>247</sup> The significant international treaties on immunity includes: [Vienna Convention on Diplomatic Relations](#), Vienna, 18 April 1961, United Nations, *Treaty Series*, vol. 500, p. 95; [Vienna Convention on Consular Relations](#), Vienna, 24 April 1963, United Nations, *Treaty Series*, vol. 596, p. 261; [Convention on Special Missions](#), New York, 8 December 1969, United Nations, *Treaty Series*, vol. 1400, p. 231; Vienna Convention on the Law of Treaties, Vienna, 23 May 1969, United Nations, *Treaty Series*, vol. 1155, p. 331; and the Vienna Convention on the Law of Treaties between States and International Organizations or Between International Organizations, 25 ILM 543 (1986) / Doc. A/CONF.129/15

<sup>248</sup> Diplomatic Privileges Act 1964 c.81 implements the Vienna Convention on Diplomatic Immunity; whereas, the Consular Relations Act 1968 c.18 implements the Vienna Convention on Consular Immunity.

Further, Article 41 of the Vienna Convention on Consular Relation (“VCCR 1963”) provides that Consular officers shall not be liable to arrest or detention pending trial, except in the case of a *grave crime* and pursuant to a decision by the competent judicial authority. However, grave crime is not defined. In addition to the United Nation instruments, the European Convention on State Immunity 1972 <sup>249</sup> also provides immunity to States and States’ properties. The convention, which aimed at establishing common rules within the Member States, stipulated that State immunity could be waived where the Party in question has accepted the court’s jurisdiction in proceedings relating to work contracts, industrial, commercial or financial activities, rights over immovable property in the State where the court is situated, and redress for injury to persons or damage to property (Bröhmer, 1997; Yang, 2012). The convention was implemented by the State Immunity Act 1978 (“SIA 1978”). <sup>250</sup> A State is immune from the jurisdiction of the courts of the UK except in criminal proceedings,<sup>251</sup> and if any of the conditions lay down under sections 2-11 are met. Otherwise, the court shall give effect to the immunity conferred even though the State does not appear in the proceedings in question.<sup>252</sup> As such, domestic workers in the diplomatic households including those who are employed to clean, cook and serve meals in the embassies (in so far as they live in the embassies or in the accommodation provided for them by the embassies) are faced with the problem of immunity if they ever want to claim against embassies or individual diplomats (Oxfam and Kalayaan, 2008). However, there are few exceptions that include waiver of jurisdiction, personal injury claims, and the doctrine of private contract.

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<sup>249</sup> European Convention on State Immunity, Basle, 16.V.1972, CETS No.: 074

<sup>250</sup> 1978 c.33, London: OPSI

<sup>251</sup> SIA 1978 c.33, s.16(4)

<sup>252</sup> SIA 1978 c.33 s.2

### 3.15.1 WAIVER OF JURISDICTION

In line with s.2 SIA 1978, a State (Ambassador or Head of Mission) could waive the immunity of anyone connected to the Embassy or Mission to allow that person to stand trial in the courts. In *Aziz v Republic of Yemen*,<sup>253</sup> a case that is not directly related to ODWs, the Court of Appeal considered the appellant by Aziz that the EAT erred in law to have held the Respondent was entitled to State immunity. The appellant who was employed by the Republic of Yemen as an accounts assistant brought a claim for unfair dismissal against the Embassy. Upon serving the claim on the Embassy, the Solicitors acting for the Embassy, signed in a notice of appearance, which the ET accepted as a waiver of jurisdiction. The Respondent appeal to the EAT that it had not waived jurisdiction was accepted by the court. On further appeal, the Court of Appeal applied the principle in *Baccus Srl v Servicio Nacional del Trigo* [1957] 1 Q.B. 438. Held, remitting the claim back to the ET for consideration on the point of jurisdiction, the court viewed that there could be no submission to the jurisdiction unless it was made by a person with knowledge of the right to be waived and with the authority of the foreign sovereign. The implication of this case is that, although any claim against the State, Diplomat, or Consular Officer may be entertained by the UK courts if immunity to jurisdiction had been waived. The waiver must be expressed and an Ambassador or Head of Mission or anyone must make it in that capacity.

### 3.15.2 PERSONAL INJURY

Section 5 SIA 1978 provides that personal injury shall be a condition for disregarding immunity. In *Nigeria v Ogbonna*,<sup>254</sup> the Claimant who had been employed by the Nigerian High Commission was dismissed following the time of work that she took to look after her daughter who had become ill. She brought an ET claim against the employer, claiming that she had been unfairly dismissed and that her dismissal constituted discrimination on the

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<sup>253</sup> [2005] EWCA Civ 745; [2005] ICR 1391

<sup>254</sup> [2012] 1 W.L.R. 139; [2012] I.C.R. 32; [2011] Eq. L.R. 1060

ground of her daughter's disability. She also averred that her treatment had caused harm to both her physical and mental health. The ET held that the complaints fell under the exclusion to immunity and allowed her claim.

Dismissing the High Commission appeal, Underhill, J. (President) relied on *Caramba-Coker v Military Affairs Office of the Kuwait Embassy*,<sup>255</sup> which had held that any claim for compensation for personal injury fell within s.5 exclusion to immunity. The EAT concluded that physical injury does not have to be 'physical', but could also include injuries like sciatica and psychological injury, which the Claimant had complained of. The benefit for the ODWs working in the diplomatic sector is that if they suffer any physical or psychological injury as a result of ill treatment by their employer, they could sue the employer.

### 3.15.3 PRIVATE CONTRACT OF EMPLOYMENT

Within s.4 SIA 1978, private contractual agreement is excluded from immunity protection. In *Wokuri v Kassam*,<sup>256</sup> the Claimant worked who was employed as a chef and a domestic servant by the Deputy Head of Mission at the Ugandan High Commission in London brought a claim in contract against the employer upon his dismissal. The key issue in the claim was the question of immunity. Dismissing the Respondent argument that she was immune from jurisdiction, Newey J observed that the Respondent has ceased to be the Head of Mission. Thus, according to Article 39(2) VCDR 1961 and applying *Swarna v Al-Awadi* 622 F.3d 123, the residual immunity available to the Respondent could not be used to defend an action which did not result from her official duty as the head of the Mission. Similarly, in *Taddese v Abusabib*,<sup>257</sup> the Claimant who was employed by an ex-diplomat, brought a claim for discrimination and harassment against the employer upon her dismissal. The Respondent who was deemed properly served did not make any representation nor attend the hearing.

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<sup>255</sup> No. EAT/1054/02/RN; 2003 WL 1610407

<sup>256</sup> [2012] EWHC 105 (Ch); [2012] 3 W.L.R. 427; [2012] 2 All E.R. 1195; [2012] I.C.R. 1283

<sup>257</sup> [2013] I.C.R. 603

Although the ET held it had no jurisdiction to consider the complaint of unauthorized deductions from wages, it upheld the discrimination claim.

Dismissing the employer's appeal, the EAT held she was unable to avail herself to the defence of diplomatic immunity as she has seized to be a diplomat. The residual immunity under Article 39(2) was not sufficient to preclude the court from jurisdiction. Further, as the claim related to a private contractual agreement, which has nothing to do with her previously held official position, there was no legal reason for the court to deny jurisdiction. Further, in *Al-Malki & Anor v Reyes & Anor*,<sup>258</sup> two domestic servants who were employed by a diplomat and his wife brought tribunal claims for unfair dismissal, failure to pay the national minimum wage and breach of working time regulations against the Respondents. The Respondents sought to rely on immunity defence but this was rejected by the tribunal. Held, to uphold the Respondents claim to immunity would amount a breach of the Claimants rights under Article 6 and 4 ECHR, rejected this. This claim further introduced the element of human rights that could be used by domestic workers to counter the reliance on immunity by their diplomat employers.

### **3.16 CHAPTER CONCLUSION**

The Home Secretary's argument that the purpose of ODW's visa does not include circumventing Government policy that allows only the brightest and best to come and possibly settle in the UK is valid . Unarguably, the control of immigration is quintessential in a democratic society and the UK Government is within its power to control the flow of immigrants into the UK. As such, it is within the power of Government to prevent domestic workers route from been used to frustrate the Government's immigration management.

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<sup>258</sup> UKEAT/0403/12/GE

Nevertheless, the Government policy must be balanced with the UK obligation to protect the rights of workers.

Where the Government policy is so partial that it ignores the continued suffering of domestic workers, one may begin to wonder whether such a policy can be ethically justified. Unlike the Seasonal Agricultural Workers Scheme,<sup>259</sup> which had allowed fruit and vegetable growers to employ migrant workers from Bulgaria and Romania as seasonal workers for up to six months at a time but was closed in 2013, there is no proof that foreign domestic workers are no longer required in UK households. Even though the UK Government has argued that there is no shortage of domestic workers in the UK, the literature review and the result of this thesis empirical research finds otherwise. Contrary to the Government's central plan to reduce net migration, the changes to the ODW's visa has not reduced the number of ODW's visas issued annually; it has, however, subjected workers to more detriment by reducing their rights and entitlements. The strict link between immigration and employment means that those who have been trafficked for domestic servitude will not be able to claim against the trafficker and/or employer because the doctrine of illegality prevents such claims. The case of *Allen v Houna* has shown how difficult it is for domestic workers to successfully sue their traffickers.

In addition, undocumented or illegal ODWs are unable to issue a claim (discrimination may be an exception) against the employer. The lack of any law that compels employers to issue a written contract to the ODWs is highly detrimental to their rights. No doubt an oral contract is legally enforceable; the purpose of a written contract is more than a mere representation of the agreement. It stands as a tool to confirm the actual relationship between the parties. The requirement under s.1 ERA, 1996 that employers should provide a statement of initial

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<sup>259</sup> See <https://www.gov.uk/government/speeches/seasonal-agricultural-workers-scheme-and-the-food-processing-sectors-based-scheme> Last accessed August 5, 2015



employment particulars is good but for the domestic workers it is far from being adequate because of the attitude of their employers.

The failure by employers to issue itemised payslip is a contravention of the domestic workers' protected rights. Even though this detriment does not directly arise from a shortfall in employment law, the lack of enforcement often gives employers the audacity to ignore the statutory provision whereby subjecting the workers to abuse and exploitation. Without a pay slip, domestic workers would not be able to easily verify if the employer has paid their tax and national insurance dues. For the ODWs on the old visa, who are eligible to apply for further stay or indefinite leave, a failure to pay tax and national insurance dues could jeopardise the success of their application.

The explicit exclusion of ODWs from health and safety and working time protections constitutes a blatant disregard for their rights. On the one hand, employment law recognises domestic workers as workers. But on the other hand, the employment law does not offer domestic workers the entire rights that it offers to nearly all other workers. The differential treatment, coupled with the increased reliance on their employers, continue to subject the ODWs to unqualified exploitation and abuse whereby leading to modern day slavery. Whilst it is conceded that given the current economic climate, the UK Government is within its right to introduce measures such as legal aid cut, the fact that the cuts have a direct negative impact on domestic workers, the majority of whom are women, means that the Government has potentially discriminated against this group of workers.

Although NGOs like Kalayaan continue to support service users, it cannot be said that all domestic workers in the UK know about or have access to Kalayaan. More so, there is a potential risk that only the cases that Kalayaan and/or its advocates consider very strong may go before the ET. Thus, some of the ODWs may miss out. The law on unfair dismissal directly excludes the ODWs admitted after 6<sup>th</sup> April 2012 from claiming unfair dismissal

against their employers because they are only allowed a maximum of 6 months residency that is far shorter than the 2 years continuous working that is required.

Further, the fact that only one judge may sit in unfair dismissal claims is not good news for domestic workers who often present with complex cases, which may be better understood by a panel. Whilst the judge may concentrate on legal points, other members of the panel who may not be legally qualified may be able to see the matter from a moral or an ordinary point of view. Whilst many researchers have explored the experience of the ODWs in the UK, investigation on their legal rights and the impact of law on their experience is rare. This chapter has identified the need to conduct a legally orientated research that could shed more light on the effect of law on the problems of domestic workers in the UK.

## **CHAPTER FOUR**

### **Conceptual Framework, Methodology, Research Method, and Research Journey**

#### **4.1. AIMS AND OBJECTIVE OF THIS CHAPTER**

The aim of this chapter is to discuss the concepts that underpin this investigation into the problems of domestic workers. This chapter will proceed by discussing the possible method(s) of conducting research and then attempt to justify the chosen method for this research, the technique of participant recruitment, system of data collection and data analysis.

#### **4.2. INTRODUCTION TO THE CHAPTER**

There are various strategies of conducting credible legal orientated research (Chynoweth, 2008). Considering that this research intends to look into the broader issues that affect domestic workers (migrants in particular) as opposed to an individual's legal problem(s), it is important to consider all the research methods that are applicable to this research. Given the aims and objectives of the research (highlighted in Chapter One) and the research questions that are in focus, it is necessary to identify the method that will allow for the examination of the effect of law on domestic workers and shed light on the perspective of the workers, their employers, and specialist informants. Such an approach will provide a three-dimensional view of the issues relating to the domestic workers to allow for the identification of the key issues and the determination of a better way forward.

#### **4.3. CONCEPTIAL FRAMEWORK**

According to Smyth (2004), a conceptual framework is a set of broad ideas and theories useful in identifying research problem(s) and formulating correct questions that must be in focus in order to sort the identified problem(s).

Smyth further argued that a conceptual framework serves two significance purposes; one of which is to enable the researcher to ascertain if the research questions could assist him/her in achieving the aims and objectives of the research and the other to enable the researcher to define the research parameters and adopt the correct strategy. There are many conceptual frameworks applicable in the study of migration for employment and in examining the experience of the migrant workers. Muñiz (2006) used the migration conceptual framework (“MCF”) to explain why people move from one sovereign country to work in another sovereign country, as well as why people move interstate. MCF has also been used by Muñiz-Solari et al. (2010) to explore why people migrate for work and the effects of migration on the individual migrant and the society. The researchers found there are two different categories of migration. The first category is the long-term migration (labour migrants in permanent employment, professionals, investors, refugees and asylum seekers). The second category is the temporary migration (labour migrants in seasonal or temporary employment, diplomats, business migrants and students). Nonetheless, whilst MCF may be useful in the study of the effect of migration, it cannot be used to explain why different groups of migrants are treated differently. It would therefore not assist the exploration of why domestic workers do not receive the same treatment as other workers, including other migrant workers. Power imbalance approach introduced by Bewley & Forth (2010) in their study of the features that make employees more or less vulnerable to adverse treatment in the workplace is another conceptual framework that is applicable to the study of migration and employment. However, because the framework restricts itself to the relationship between the employer and the employees, it may not assist in the exploration of non-employment (non-contractual) problems of domestic workers. Ruhs and Anderson (2010) introduced a comprehensive framework for analysing demand for migrant workers in high-income countries.

The framework highlighted how the demand for migrant workers links wider policies and economic/social systems that the State has a heavy influence on, and are outside the direct control of employers and workers. Whilst this framework appeared relevant to this current research, it cannot assist in providing answer(s) for the differences in the treatment of the various groups of migrant workers. The vulnerability of ODWs is not limited to workplaces because the factors that predispose them to vulnerability are both workplace and non-workplaces related (ILO, 2013). It is thus important to explore these factors and examine how they interact to affect the plights and dilemmas of these workers. In the view of Fitzgerald, et al. (2010), vulnerability comes in varying degrees to the extent that even vulnerable workers are not subject to the same degree of risk. Workers who perform similar tasks in the same precarious employment may not have similar vulnerability, and their lived experience may vary because the factors that predispose them to vulnerability vary (TUC, 2008). Variables such as geographical, biological, political, social, and economic determine layers of vulnerability (Sargeant and Tucker, 2010). Thus, the worker's personal attributes (such as socioeconomic background), type of work, workplace conditions, and the presence or absence of mitigating circumstances could determine the level and nature of risk he/she is exposed to (Barrett and Sargeant, 2011). A good resilience and capacity to withstand the risk-exposing agents is necessary to prevent danger materialising and/or prevent any detriment (DTI, 2006: 25). Luna (2009), who has used the 'layers of vulnerability' framework to explore the concept of vulnerability, argued vulnerability is not a label but a layer that is augmented by economic, social and political exclusion. This framework has also been used by Sargeant & Tucker (2010) in their comparative assessment of the risks of occupational health and safety hazards amongst migrant workers in the UK and Canada. They found the risk of wage theft, exploitation, and occupational health and safety hazards amongst migrants are not evenly distributed.

Applying the layer of vulnerability to the current research, one may argue although ODWs in diplomatic households may experience problems similar to that of their counterparts in private households, the intensity of the problems of individual ODWs would vary according to the employer, the tasks they perform and working environment in which they work. Thus, the layer of vulnerability as a conceptual framework could provide a very useful lens to assist the holistic exploration of the historical background of domestic workers' problems, the rights of foreign domestic workers in the host States, as well as why these rights do not apply evenly to all groups of domestic workers. This would allow for a better understanding of the dilemmas faced by the ODWs, not only in the UK in particular but also in the world at large. It will also assist in providing a solid and sustainable explanation for their vulnerability and how the vulnerability could improve. Further, this framework could assist in maintaining a focus on the legal rights of ODWs, the precarious nature of their work, as well as how this precarity affects their vulnerability.

#### **4.4. LEGAL RESEARCH METHODOLOGY**

Legal research methodology is a professional way “to identify and locate primary and secondary resources” (Van Gestel et al., 2012: 1). The researcher's legal expertise, philosophical stand, research skills, purpose of the research, and the research question(s) that is in focus would determine the research strategy to be adopted (Shepard et al., 1993). Knowing the sources of law plays a central role in our understanding of the law (Danilenko, 1993: 23). However, finding the source of law is not a simple task. What constitutes the sources of law remains debatable (Bederman, 2010: 105; Hoof, 1983: 13). Although the legal profession is an established and well-regulated discipline, given that the perception of legal knowledge varies according to different schools of thought (Cotterrell, 1995; Freeman, 2008), what constitutes legal know-how also remains debatable.

Legal epistemology, which according to Samuel (2003) relates to the theoretical study of legal science, is a branch of philosophy that concerns itself with the source, structure, and limits of knowledge, as well as the relation of knowledge to beliefs. Thus, the primary concern of legal epistemology is with propositional and expertise knowledge (Rooyen, 2011). The philosophy of law incorporates the law and the legal system to the extent that the way the law works and the way the legal system operates may not be alike (O'Reilly and Chalmers, 2014). Legal theory can either be descriptive or normative in nature (Vermeule, 2007). Whilst “descriptive legal theory seeks to explain what the law is, and why, and its consequences, normative legal theory is concerned with what the law ought to be” (Wacks, 2006: p. xiv). A typical example of normative legal theory is doctrinal research.

#### 4.4.1 DOCTRINAL RESEARCH METHODOLOGY

Due to its strict adherence to the letters of law, doctrinal research is often referred to as black-letter law (McConville and Chui, 2007). This research, which centres on the formulation of legal doctrines through the analysis of legal rules, restricts itself to finding a solution to a legal problem at focus. Although it is open to academic, non-academic, paralegal, and legal commentators (McConville and Chui, 2007), it is popular amongst legal practitioners who are skilled in conducting research aimed at finding specific answers hidden in legal texts (Watkins and Burton, 2013) rather than looking at the effect of law in a wider sense. It is the most widely used method by lawyers investigating and/or trying to find an answer to a legal problem (Chynoweth, 2008; Hutchinson and Duncan, 2012). Judges upholding judicial functions also perform doctrinal research to keep abreast with the law in order to manage courtroom affairs (Hutchinson, 2008).

Professionally, lawyers must demonstrate acceptable competency in doctrinal research in order to give correct legal advice because lawyers who give negligent legal advice could be held 'liable' to their clients and may be referred to the governing body for disciplinary action.<sup>1</sup> Thus, doctrinal research is considered a conservative research method because it adheres to the traditional style of legal research, and can only be conducted by those who have at least a basic knowledge of law and have familiarised themselves with the legal system (Genn et al., 2006).

Doctrinal research questions, which could differ in perspective from the questions asked by empirical investigators, take the form of asking 'what is law?' in particular contexts (Chynoweth, 2008: 29-30). In the view of Birks (1998: 399), "the juristic function is to analyse, criticise, sift, and synthesise, and thus to 'play back' to the judges the meaning and direction of their own daily work, now conducted under ever increasing pressure". The playback that Birks referred to related to the adversarial role of lawyers. But Birks' description of doctrinal research method could be simplified as "systematising, rectifying, and clarifying the law on any particular topic by a distinctive mode of analysis to authoritative texts that consist of primary and secondary sources" (McConville and Chui, 2007: 4). However, the process of finding the law is "not merely a search for information, but primarily a struggle for understanding and the need to think deeply about the information" (Lynch, 1997: 415). Hence, it is a rigorous investigation and one which must be done carefully. Although doctrinal researchers mainly focus on the use of hard-copy documents (in library) to find law (Clinch et al., 2006), with advancement in technology, research materials have become available in software.

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<sup>1</sup> Under sections 4 & 11 of the *Courts and Legal Services Act 1990*, UK Courts can make a 'Wasted Costs Order' in civil or criminal proceedings against the legal representative. In Canada, Rule 57(37) (c) of the *Supreme Court Rules* empowers Courts to make cost order where a lawyer has caused costs to be incurred 'without reasonable cause, or has caused costs to be wasted through delay, neglect or some other fault' (*World Wide Treasure Adventures Inc. v. Trivia Games Inc.* (1987), 16 B.C.L.R. 135 (S.C). The standard for Canadian counsel appearing before the court is set by *Lougheed Enterprises Ltd v. Armbruster* (1992), 63 B.C.L.R. (2d) 316 (C.A).



#### 4.4.2 CRITICISM OF DOCTRINAL RESEARCH

The critics of doctrinal research (who are mainly non-legal practitioners) are of the opinion the legal profession is a conservative discipline (Kilmer, 1975: 240; Moliterno, 2013: 81; Rising, 2010: 95), self-alienated (Becher, 1981: 111), outdated and plagued with claustrophobia (Cotterrell, 2002), and insensitivity to the needs of the society (Sugarman, 1991). These criticisms relate to the argument that doctrinal research is too client-focused, problem specific, and often leaves no room for a broader legal exploration. Accordingly, there are those who believe doctrinal research is out of touch with the real world (Brownsword, 2006; Maharg, 2007; McConville and Chui, 2007), and that legal “practitioners could not sustain the constant flow of critical analysis which, is essential to the well-being of our law” (Birks, 1998: 400). Perhaps the fiercest attack on doctrinal research is the suggestion by Posner (2008: 1) that doctrinal research is dead. What Posner meant by this statement is not clear because he cited no evidence to show that doctrinal research is no longer valid or no longer required by legal researchers. In any event, the attacks on doctrinal research are as though there is a changing tide in our societies, which is affecting the way we view the relationship between law and the society. The attacks could be a recognition that legal research may no longer be limited to the courtroom exercises or legal advocacy, but could be extended to exploring issues that are of interest to the public. Meanwhile, in an attempt to appease the critics of doctrinal research, it may be necessary to harmonise doctrinal research with the needs of society and the effect of law on society. The argument proposed by Samuel (2009) that legal training is archaic and outdated parallels with an earlier criticism of Vick (2004: 164) who has argued legal discipline is “intellectually rigid, inflexible, and inward looking”. There have been calls for legal scholarship to embrace empirical research methods (Van Gestel et al., 2011), and for focus of legal education to be revitalised (Maharg, 2007) with a view to changing how legal research is performed.

It is believed that combining the two research methods would lead to the best outcome (Cotterrell, 2006). This assertion is supported by a review of legal research teachings conducted by the UK Centre for Legal Education (UKCLE) (2006-2011) that highlighted the need for the inclusion of socio-legal research method into law students' curriculum. Nevertheless, none of the attacks on doctrinal research has acknowledged that in addition to its usefulness in advising a client or a group, legal research could help shed light on our understanding of what law is, how the law works, and the legal process. What also remains obscure in all the critics' arguments is how the contemplated changes to the way we do doctrinal research could assist legal practitioners in their advocacy and in dealings with the individual client. Further, a doctrinal research for advising an individual on a particular issue might be different from a doctrinal research that explores general legal issue(s).

#### 4.4.3 DOCTRINAL RESEARCH – SKILLS AND METHOD ANALYSIS

Doctrinal researches take precedence in the way law students are taught, think, and write about law (Sugarman, 1991: 26). At the beginning of their law courses, law students are taught special skills necessary in conducting doctrinal research (Clinch et al., 2006; Smith, 2010; Valentine, 2010). These skills include identifying legal problem(s), knowing which law to find, where to find it, how to find it, how to apply the findings, and how to communicate the findings to the appropriate audience (McConville and Chui, 2007). The process of conducting doctrinal research by legal practitioners is similar to that used by legal scholars because the utmost aim is to find the law that is hidden in the statute book, common law, case law, legal publications, or documents (Chynoweth, 2008). Amongst the various methods of conducting doctrinal research are comparative legal studies, case studies, document analysis, content analysis, and legal realism/critical theorists (Halliday, 2009; Hutchinson, 2008; McConville and Chui, 2007; Palmer, 2004). Whichever method(s) is used would depend on the need of the research.

To begin with, the researcher must be clear on the reason(s) and purpose(s) of the research (Hutchinson and Duncan, 2012; Serfontein, 2012). This is essential to the extent that a doctrinal research for academic purposes might be different in content to a doctrinal research in civil or criminal litigation. Further, the researcher must be clear about the legal issue(s) at hand in order to identify the relevant legal sources and materials. For the purpose of litigation, in addition to identifying legal problems, the researcher would consider the statement of evidence and probe same with questions such as who, what, where, when and how; with the view of establishing essential facts (Hutchinson, 2008). For instance, in an employment-related problem, it would be essential to establish: (1) if the client was an employee and, if yes; (2) who was the employer; (3) what the terms of agreement were; (4) the place of work; (5) when, how and why the client lose the job. These probes would allow for the establishment of facts and the identification of legal issues that may include issues of contract, dismissal procedure, and compensation. These legal issues would constitute the research questions that could assist the researcher to correctly address the legal problem(s). By a way of summary, a typical doctrinal research would include these steps:

- 1) Identifying and finding the Relevant Legal Sources and Materials
- 2) Extracting the Essential Points from those Legal Sources and Materials
- 3) Applying the law to the Facts of the Problem
- 4) Communicating Legal Opinion

#### **4.5. EMPIRICAL RESEARCH METHODOLOGY**

Research methodology implies “the general approach the researcher takes in carrying out the research project” (Leedy & Ormrod 2001: 24). More pragmatically, by research methodology, we mean the logical strategy that could assist researchers in the conduct of their empirical inquiry.

These logical steps would involve a research method or combination of methods that could help the researcher to achieve the research aim and objective. According to Creswell (2009) for a framework for research design, a good research design must take a philosophical assumption such as positivism, post-positivism, pragmatism, or social constructionism. The researcher must then consider the strategies of inquiry, such as qualitative, quantitative, or mixed method (Williams, 2007: 65). This would in turn allow the researcher to adopt a specific research method (Creswell, 2009: 5). The theoretical knowledge and belief of researchers often inform whichever social science research method they adopt (Fink, 2000; Ryan and Bernard, 2000). As such, an empirical research could take the form of qualitative approach in conducting in-depth investigation, or a quantitative approach that explores huge statistical data (Bryman, 2005; Niglas, 2000). A combination of the two research methods is also possible depending on the issue under investigation (Creswell, 2006). Qualitative and quantitative methods are well-established research methods that are rooted in a different epistemology (Teddlie and Tashakkori, 2009). But, quantitative and qualitative research differ in terms of characteristics such as a methodology, ontology, and epistemology. Whilst qualitative research adopts interpretivism epistemology, quantitative research adopts positivism epistemology (Johnson et al., 2007). Researchers employ a different paradigm that “represents a worldview that defines for its holder the nature of the world, the individual’s place in it, and the range of possible relationships to that world and its parts” (Guba and Lincoln, 1994: 105). Given different schools of thought are historically entrenched in tradition, the researcher’s basic belief or metaphysics derived mostly from epistemology would differ (Creswell & Plano Clark, 2011).

#### 4.5.1 QUANTITATIVE RESEARCH METHODOLOGY

Quantitative research, which has its origin in science, is by far the oldest way of conducting empirical researches (Guba and Lincoln, 1994). Quantitative proponents reject idealism, but embrace a positivist philosophy; a concept that refers to an assumption about how the world works (Dawson et al., 2006). In the view of positivists, human behaviour is a reaction to external stimuli that are researchable and measurable using appropriate mathematical instruments (Bisman, 2010; Niglas 2000). The modern approach to positivism was developed in the 19<sup>th</sup> century by Auguste Comte (1798-1857) whilst French Sociologist Emile Durkheim (1858-1917) developed modern day sociological thought (Seidman, 1983). Durkheim, who believed our society exerts pressure on individuals, called the pressure social facts (Ross, 1991). These social facts, according to quantitative researchers, are the identifiable and measurable truth of our social world (Gilbert, 1992). Social facts include “way of acting, fixed or not, capable of exercising on the individual an external stimulus; or again anyway of acting, which is general throughout in a given society, which at the same time existing in its own right independent of its individual manifestation” (Worsley, 1991: 23). The social fact that is in focus in the current research is the dilemma faced by ODWs in the UK and in the world at large. In order to determine if quantitative research method could assist this research, it is essential to examine what the research method entails. Quantitative research method involves the use of statistical information in proving a theory (Guba and Lincoln, 1994). Quantitative researchers set hypotheses to be tested and often experiment with large sets of data that would in the end generate huge statistics (Creswell, 2008). This research “involves the collection of data so that information can be quantified and subjected to statistical treatment in order to support or refute alternate knowledge claims” (Williams, 2007: 66).

Using a deductive approach, the statistics generated by quantitative researchers could be broken down into a theory to allow for the emergence of a testable hypotheses (Hyde, 2000; Morse, 1991). “Quantitative research methods attempt to maximise objectivity, replicability, and generalisability of findings, and are typically interested in prediction” (Harwell, 2011: 149). Bean (2011: 175) who argued the concept of generalisability is the most important aspect of quantitative scientific approach also argued that quantitative research method is “a powerful statistical tool that allows researchers to make predictions about patterns of behaviour in a population”. In the view of Harwell (2011), integral to quantitative approach is the expectation that a researcher will set aside his or her experiences, perceptions, and biases to ensure objectivity in the conduct of the study and the conclusions that are drawn. Quantitative researchers often place much emphasis on defining and adhering to a methodological protocol to assure reliability of the data (Samdahl (1999: 119). Further, quantitative researchers seek explanations and predictions that could allow the generalisation of the situation in a particular group to other similar groups (Leedy and Ormrod, 2001: 102). The ODWs around the world experience exploitation and abuse (ILO, 2013), but the degree of their exploitation and abuse, as well as impact on the individual ODW vary. Also, the experience of those in private households may be different from the experience of their counterparts in diplomatic households. So, the lived experience of one ODW may be different from that of the others. Thus, whilst it is possible to test a hypothesis on the problem of domestic workers, it would be difficult to generate a hypothesis that would assist the investigation into the feelings otherwise lived experience of the domestic workers. Further, given that quantitative method decontextualises human behaviour in a way that removes the event from its real world setting and ignores the effects of variables (Weinreich, 2006), the method does not appear highly appropriate in the current research because the link between dilemmas of ODWs and the social environment in which they find themselves is inseparable.

The more the predisposing factors of vulnerability that are present in a society, the more the likelihood ODWs will experience vulnerability in that society. So, whilst quantitative research method may be useful in identifying statistics on the problems of domestic workers, the absence of the ability to conduct one-on-one or face-to-face interview with participants means that it would be difficult to fully appreciate the lived experience of workers. Accordingly, it is relevant to consider qualitative research method.

#### 4.5.2 QUALITATIVE RESEARCH METHODOLOGY

Qualitative research is “any kind of research that produces findings not arrived at by means of statistical procedures or other means of quantification” (Strauss and Corbin, 1990: 17). Qualitative researchers rely on interpretivism; a theory that is based on social facts and believe that “human beings interpret the world they inhabit, so that the world is pervaded with meaning” (Halfpenny, 1999: 57). Qualitative researchers are of the opinion that the individual constructs meaning, such that there are different interpretation of the social world based on the individual’s experience and the perception of it (Crotty, 1998). “Interpretive research paradigm is based on the epistemology of idealism and encompasses a number of research approaches, which have a central goal of seeking to interpret the social world” (Ajajawi and Higgs, 2007: 613). In the view of Crotty (1998: 67), Interpretivists “look for culturally derived and historically situated interpretations of the social life-world”. Unlike quantitative researchers who believe in objectivity, qualitative researchers believe in subjectivity and query whether empirical research can be wholly objective (Ratner, 2002). Although subjectivity creates a tendency to be biased, researchers are are trained to acknowledge and manage it (Drapeau, 2002). Qualitative research has as its main goal, the gaining of experienced with the phenomenon in which the researcher holds an interest (Myers, 2000). However, the data generated is ‘raw’ with little, if any, pre-categorisation (Patton, 1990).

Qualitative researchers collect data through their interaction with participants (Silverman, 2001), focus on concise samples and generate theory from the interpretation of the evidence using an inductive approach (Miles and Huberman, 1994). Considering the current research aims to understand the problems of domestic workers through their lived experience, qualitative research methodology appears to be highly relevant. Given this, it becomes necessary to examine which qualitative research method would be more appropriate in this research. According to Denzin & Lincoln (2000), the various methodological approaches to qualitative research include phenomenology (including hermeneutic phenomenology), ethnography, and grounded theory. Creswell (2003) has added case study and narratives to the lists of qualitative approaches. Whilst hermeneutic phenomenology is related to the interpretation of lived experiences (Moustakas, 1994), ethnographic research that may combine qualitative and quantitative research methods (Taylor, 2002), is a social science research method that allows the researcher to embed him/herself within the community that is being studied (Joy, 2007; Myers, 1999). “Grounded theory methods consist of flexible strategies for collecting and analysing data that can help ethnographers to conduct efficient fieldwork and create astute analyses” (Charmaz and Mitchell, 2001: 160). Of the various qualitative research methods, hermeneutic phenomenology is preferred because of the opportunity to investigate and interpret lived experiences.

#### **4.5.3 PHENOMENOLOGICAL APPROACH**

Phenomenology is a branch of anthropology, a science that covers all aspects of human life, including the biological, cultural, and physical nature (Creswell, 2006). Phenomenology is a philosophical strategy or a combination of strategies aimed at introducing a new way of studying the life world and the social facts through a non-scientific means that focus on human objects as the agent of change (Groenewald, 2004; Pringle, 2011).



German Philosopher, Edmund Husserl (1859-1938), famous for his phenomenological approach, was “the fountainhead of phenomenology in the twentieth century” (Vandenberg, 1997: 11). According to Eagleton (1983), the aftermath of the First World War (1914-1918) and its devastating effect on Europe inspired the development of a new form of radical phenomenology approach. The old ideology of a European capitalism system that has its roots in positivists’ scientific approach to every problem could not be used to solve the majority of post-war problems. It was therefore necessary to develop “a new philosophical method which would lend absolute certainty to a disintegrating civilisation” (Eagleton, 1983: 54). The new phenomenology approach allows the studying and description of phenomena (hence the reference to it as a descriptive philosophy) through the lived experience of those affected by it; hence the slogan “*Zurück zu den sachen*” or “back to the things themselves” (Eagleton, 1983; 56). As such, phenomenology approach involves the exploration of people’s experience as they relate it (Smith, 2011). Smith (1997: 80) defined hermeneutic phenomenology as a “research methodology aimed at producing rich textual descriptions of the experiencing of selected phenomena in the life-world of individuals that are able to connect with the experience of all of us collectively”. Life-world is the “locus of interaction between ourselves and our perceptual environments and the world of experienced horizons within which we meaningfully dwell together” (Garza, 2007: 314). This approach, which is perhaps “the most fascinating, bizarre, disturbing, and necessary form of witnessing left to us at the end of the twentieth century” (Behar, 1996: 5) is “based on a paradigm of personal knowledge and subjectivity, and emphasises the importance of personal perspective and interpretation” (Lester, 1999: 1). Phenomenological researchers often start from a perspective that is free from hypothesis or preconceptions endeavour to describe rather than explain a phenomenon (Lester, 1999). The aim of phenomenological approach is to illuminate phenomena through how they are perceived by actors in a situation (Lester, 1999).

Hermeneutic phenomenology thus aimed at describing and illuminating “the lived-world in a way that expands our understanding of human beings and human experience” (Dahlberg et al., 2008: 37). Through the description of peoples’ lived experience in their own word, the researcher would be able to show the real impact of the issue at focus (Creswell, 2006). “The flexibility of phenomenological research and the adaptability of its methods to ever widening arcs of inquiry has been one of its greatest strengths” (Garza, 2007: 338). Accordingly, this approach could assist in the exploration of domestic workers’ problems through their lived experience. It could assist in illuminating the problems through their employers’ perspective; thus making it more visible. Nevertheless, Hermeneutic phenomenology, an offshoot of the phenomenology approach, allowed researchers to look beyond mere description of people’s lived experience, introduced meanings through interpretations and made sense of the lived experience. Given that, “the human world comprises various provinces of meaning” (Vandenberg, 1997: 7), researchers must clarify the meaning of text without distorting it. Reflective interpretation of texts is necessary to make them more meaningful (Correia, 2008; Peeler, 2005). This process includes “a description of the experience as it appears in consciousness, an analysis and astute interpretation of the underlying condition, historically and aesthetically, that account for the experience” (Moustakas, 2004: 10). According to Heidegger (1962: 37) the true meaning of texts “lies in interpretation”. The slogan, “the whole should be understood from the part, and the part should be understood out of the whole” (Dobrosavljev, 2002: 607) was an old hermeneutical principle that originated from the practice of interpretation of ancient texts. The three core elements of hermeneutic phenomenology are: (1) understanding the concept or phenomena (subjective knowledge); (2) interpretation of the texts of the lived experience; and (3) the application of the findings (Kakkori, 2010; Kafle, 2011; Laverty, 2003). Amongst the widely used phenomenological approach are interviews, and focus group (Finlay 2009). The current research will attempt to

use hermeneutic phenomenology method to investigate and obtain in-depth information on the problems of domestic workers.

## **4.6. LEGAL – EMPIRICAL RESEARCH (MIXED) METHOD**

The essence of combining empirical and legal research method in this study is to ensure that the research is able to accomplish its aim of investigating the problems of domestic workers from a legal point of view. The empirical research would allow the researcher to make sense of the issues identified in the legal research. It would further allow the researcher to reach a conclusion which is thorough and well informed.

### **4.6.1. EXPLAINING LEGAL-EMPIRICAL METHOD**

The idea of mixing research methods originated from Campbell and Fiske (1959) who, in their experiment entitled convergent and discriminant validation by the multitrait-multimethod matrix, combined a quantitative method with observation techniques to check their findings and to reassure themselves that their original findings were correct. Legal-empirical research method is a non-traditional approach to conducting investigations on legal issues and the legal institutions (McConville and Chui, 2007). “Empirical research in law involves the study, through direct methods rather than secondary sources, of the institutions, rules, procedures, and personnel of the law, with a view to understanding how they operate and what effects they have” (Baldwin and Davis, 2003: 880). Since there is no benchmark for multidisciplinary research, all researchers that choose to do so, may use this method (Lin, 2014; Tedford, 2009). Consequently, some legal-empirical researchers with little or no legal competencies have been noticed to have been producing literatures on law reform.<sup>2</sup>

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<sup>2</sup> Review of a leading British periodical for Socio-Legal Studies, *Journal of Law and Society*, show most of the articles is from those without any legal knowledge or background. See for instance Scott, C., Cafaggi, F., Senden, L. (2011) *The Conceptual and Constitutional Challenge of Transnational Private Regulation*, *Journal of Law and Society*, 38 (1), pp. 1-19.

Accordingly, what constitutes legal-empirical research continues to generate debate amongst legal scholars and other empirical researchers, especially in the field of social sciences (Epstein, 2002; Heise, 1999; Posner, 1995). Nonetheless, legal-empirical researchers focus on issues that affect a wider society, rather than the legal problem of a particular individual or finding of legal precedents (Epstein, 2002). A typical legal-empirical research would involve a combination of a social science research method (qualitative, quantitative, or mixed) with research in law (doctrinal) (Cane and Kritzer, 2012) to investigate the effect of law in the society and on the social institutions (Burns and Hutchinson, 2009; Revesz, 2002). Depending on the researcher(s)' background and skills, legal-empirical research could be either multidisciplinary or interdisciplinary.<sup>3</sup>

#### 4.6.2. MAKING A CASE FOR LEGAL-EMPIRICAL METHOD

According to Cownie, 2004: 58), "law is a discipline in transition with a culture where a small group still clings to a purely doctrinal approach, but a very large group are mixing traditional methods of analysis with analysis drawn from a range of other disciplines among the social sciences and humanities". Given the world is a continuum (Kinsey et al., 1948), as things around us change, the notion of law what constitutes legal knowledge may change. Empirical findings are now relevant in assessing legal teaching and practices (Clinch et al., 2006). Legal-empirical researchers often advocate issues that relate more to the society than to the individual (Burns and Hutchinson, 2009; Hasnas et al., 2010). The growing need for law reform has encouraged legal researchers to look beyond the letters of the law and examine the real impact of the law in the society (Lindsey, 2007). Not surprisingly, literature making a case for radical changes in legal scholarship in general and legal empirical research in particular is vast (Bahr, 2001; Macdonald, 2006; Posner, 1995, Warwick, 2007).

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<sup>3</sup> The terms Interdisciplinary and multidisciplinary are often used interchangeably in literature but they are not the same. An interdisciplinarians is an individual with multiple skills and ability to conduct research that cut across disciplines; whereas a multidisciplinarians is an expert in own discipline skills who work as a member of a broader team by collaborating with researchers from the other discipline(s).

Doctrinal research has been criticised for been incapable of dealing with challenges and complex issues in the society (Samdahl, 2009; Schwarcz, 1997; Shapiro, 1999). By incorporating empirical research method into legal research, legal academics will have the opportunity to compete evenly with the empiricists (Heise, 1999). Making a case for legal-empirical method, the first chairman of the Law commission Lord Leslie Scarman argued:

There is no cosy little world of lawyers' law in which learned men may frolic without raising socially controversial issues.... I challenge anyone to identify an issue of law reform so technical that it raises no social, political or economic issue. If there is such a thing, I doubt if it would be worth doing anything about it. <sup>4</sup>

The argument highlighted the need for legal researchers to look beyond courtroom advocacy and adversarial roles to focus on the effects of law in the society and on its institutions. Legal reform requires effective understanding of how law works in society (Schuck, 1989). Whilst recognising the divide between legal scholarships and empiricist, Baldwin & Davis (2003: 881) who has argued for a move towards interdisciplinary also argued whilst ‘legal scholars engage in painstaking analysis of decisions taken in the courts, social science disciplines contributes to a widespread recognition that the study of what the law does can be as stimulating and intellectually challenging’. Making a case for socio-legal research, Cotterrell (2002) contended legal researchers should familiarise themselves with resources offered by social science and endeavour to incorporate social scientific insights and perspectives into legal scholarships with the view to developing perspectives other than that of doctrinal legal scholarship. He continued to state that the theoretical study of legal should adopt both the doctrinal and empirical approach. ‘‘In this way, socio-legal studies would not merely be juxtaposed with traditional legal scholarship, but would invade it and begin to reshape it in ways that renewed its vital engagement with the currents of change in society that social scientists studied’’ (Cotterrell, 2002: 634).

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<sup>4</sup> Scarman, L (1968) *Law Reform: The New Pattern*, London: Routledge & Kegan Paul, pp. 27 – 28

Although one may argue using multiple and diverse methods to teach law students may not constitute good science (Greene and Caracelli, 1997: 5), there is evidence to suggest empirical findings assist in assessing legal teaching and practices (Clinch et al., 2006: 42-43). Further into this argument, the Nuffield Foundation and the Economic and Social Research Council (ESRC) have long expressed concerns regarding the shortfall in empirical research in law. The organisations consider legal-empirical research as a contemporary method of assessing the effect of law on the society (Adler, 2007). “[W]hen law graduates who do consider an academic career choose postgraduate courses and topics for doctoral research, they naturally gravitate towards doctrinal topics and issues in law” (Glenn et al., 2006: 87). This thus leads to an almost inevitable pattern of self-replication, lack of broader skills and non-familiarity with empirical research. Legal-empirical approach could provide the catalyst to boost law reform order to reform and general awareness (Van Gestel and Micklitz, 2011). Proponents of legal-empirical research see the opposition of legal scholarships to their research as being naïve (Darian-Smith, 2013; Edmond, 2005; Kalman, 1986).

It has also been argued that legal scholarships who oppose to multidisciplinary are fearful that doing so might undermine the legal profession (Beever and Rickett, 2005). If legal scholarships adopt legal-empirical method Cotterrell (2002: 457) argued, it would not destroy but “strengthen and enrich the discipline”. Furthermore, “interdisciplinary research is perceived to be popular with research funding bodies, and for legal academics in particular, it provides access to research grants of a magnitude not usually available for pure legal research” (Vick, 2004: 171). Legal scholarships intending to reach out more to the wider society would find it worthwhile to embrace pragmatists “plurality of method and multiple method philosophies” (Maxcy, 2003: 52). The way a legal scholar might approach and comment on a question of law could be different to that of a social scientist (Dunoff, 2014).

Accordingly, the combination of legal and empirical method would allow researchers to view the problems at focus from different direction (Blumenthal, 2002; Leo and Gould, 2009). Doctrinal research alone would not be adequate in explaining the impact of law on domestic workers and in exploring the workers lived experience. Therefore, this research will attempt to combine black letter law and empirical research method to understand the problems of domestic workers and the relevance of law to these problems. The researcher will triangulate<sup>5</sup> the findings of the empirical research with the outcome of the legal research. conduct separate legal and empirical research to gain a better understanding of the problems of the domestic workers.

#### **4.7. RESEARCH DESIGN**

According to Robson (1993: 38), research design is concerned with turning research questions into specific projects. “A research design serves two purposes: (a) its helps the researcher to make a rational allocation of his resources for collecting material for his research; and (b) it allows him to identify the tools he may require for his research” (Chatterjee, 1997: 18). Identifying a study’s research design is important because it communicates information about key features of the study (Harwell, 2011). These features include “the epistemology that informs the research, the philosophical stance underlying the methodology in question, the methodology itself, and the techniques and procedures used in the research design to collect data” (Harwell, 2011: 148). In designing the current research, the researcher considers an interdisciplinary method. On the one hand, the legal research assists in the exploration of the immigration law and policy as well as the labour law including health and safety regulation as they affect ODWs (Hutchinson and Duncan, 2010).

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<sup>5</sup> Triangulation in legal empirical research involves combining doctrinal skills with empirical research skills, as basic knowledge in law is required for empirical research in law to be meaningful, valid and or credible. A degree of competency in the black letter law is essential in order to gain full insight into law in practice. A sociological-based research on law might tell us how the law works in the society but its findings might not be useful to practising lawyers in particular, if the research fails to address the current state of law in practice.

On the other hand, the empirical research that employs a qualitative method with interpretive epistemology, allows for an in-depth understanding of the phenomenon under consideration (Fink, 2004; Gerring, 2004; Myers, 2000). Miller and Crabtree (1994) have identified four broad approaches to mixing research methods:

1. Concurrent design - where two independent studies are conducted on the same study population and the results are converged. For example, interventions might be enhanced if the researchers concurrently conduct an interpretive study to examine the process of implementing the intervention or improvement.
2. Nested Design - where qualitative and quantitative methods can be integrated into a single research study. For example, qualitative studies can be used to understand and operationalise key variables and at the same time, outcomes are evaluated. Two different methods are integrated into a single research study.
3. Sequential design – where the result of one method informs the results of another study. For example, using field methods to develop key variables before developing measurement instruments.
4. Combination design - where a case study design combines multiple methods in order to understand the complexity of a setting. For example, a researcher may combine field methods sequentially with survey techniques, interviewing and record or chart review.

Of the above approaches, nested design is considered the most appropriate for this research because it will allow the researcher to conduct a legal research alongside an empirical research. Using dominant and less-dominant approach as postulated by Cresswell (1994), the researcher sets out to perform a research, which utilises legal and qualitative paradigm at uneven ratio (Cohen and Crabtree, 2006).



The dominant approach is the legal approach which, is the core aim of this research that sets out to understand the dilemmas of ODWs from a legal perspective. The less dominant approach is the empirical research that is included to allow for an in-depth understanding of the effects of law on this group of workers.

#### **4.8. RESEARCH STAGES**

There are five key stages in this research. The research started with a thorough review of literature. This allowed for the elucidation of the available knowledge on the ODWs in the UK in particular and in the world in general. It also helped to throw light onto the current state of affairs of the ODWs and assisted in identifying the area(s) that needed further exploration. Following on from this was the synchronised legal and empirical investigation into the current position of the law in relation to the plights of the ODWs. The legal research involved perusing relevant publications and well know databases such as LexisNexis and Westlaw for case law, statutes, and legal articles and commentaries. It also involved an examination of international jurisprudence and a comparative legal analysis. This research continued alongside the empirical investigation. The third stage was dominated by the empirical research. Access negotiation, ethical approval, sampling and participant selection were amongst the various challenges faced by the researcher at this stage. The fourth stage involved empirical data gathering, data storage, and analysis. At the fifth stage, the researcher attempted combining (sieving, clarifying, comparing and contrasting) the findings of the empirical investigation with the findings of the legal research by a way of triangulation. The process allowed for the detection of diverse viewpoints or standpoints on a phenomenon (Olsen (2004)).

## **4.9. SAMPLING**

The ultimate goal of sampling is to select participants who could illuminate the phenomenon at focus and provide the researcher with relevant data (Lester, 1999). In the view of (Flick, 2009: 125), “sampling decision cannot be made in isolation. The appropriateness of the structure and the contents of the sample, and thus the appropriateness of the strategy chosen for obtaining both, can only be assessed with respect to the research question of the study”. It is thus paramount that the researcher formulate a sustainable research question(s) that would assist the study at focus. However, in addition to the research question(s), certain criteria, such as experience and expertise could hinder the sampling process (Thomson, 2011). The researcher’ competency in both legal and empirical research skills was very useful throughout the current research.

Probability and non-probability sampling are the two distinct types of sampling procedures (Adler and Clark, 2010). Probability sampling that takes its origin from quantitative research epistemology (Doherty, 1994), aims at selecting a group of participants who are representative of the larger group of the sample (Babbie, 2013). This sampling choice involves using some a mechanical or statistical procedure in selecting participants from a random list (Zikmund and Babin, 2006). The idea is to calculate the probability of selecting a subject. Given the nature of probability sampling, especially the reliance on statistics, the researcher concluded it is unsuitable for this research. Nevertheless, a review of the non-probability sampling procedure showed its focus is not on a population but, a unit that may or may not represent a section of the population (Adler and Clark, 2010; Kothari, 2004). Non-probability sampling which, is popular with researchers using a qualitative epistemology, could assist in demonstrating that a particular trait exists in the population (Denscombe, 2007).

The purpose of non-probability sampling is to recruit subjects who are not only easy to recruit but, possess particularly information about the research issues (Lunsford and Lunsford, 1995). Above all, this sampling procedure is not just considered inexpensive and convenient, it is highly relevant where a descriptive comment about the sample itself is necessary (Connaway and Powell, 2010). The researcher is of the opinion that this sampling procedure is the most suitable for the current research that seeks to explore the lived experience of domestic workers. This procedure would allow the researcher to sample the opinion of the workers, their employers, and the relevant informants. According to Connaway and Powell (2010), the different categories of non-probability sampling include:

- 1) Convenience sampling – this involves recruiting the subjects that are easily accessible to the researcher.
- 2) Purposive sampling – this method that is also known as deliberate sampling, involves the selection of a particular unit of the population that may or may not represent that population. The selection of participants is not because they are readily available but, because they meet certain criteria that are relevant to the study. For instance, having a special knowledge of experience on the issue at focus.
- 3) Quota sampling – this involves a non-random sampling of representative of a larger population. It is a sampling technique wherein the researcher ensures equal or proportionate representation of the subjects depending on which trait form the basis of the quota.

After carefully considering the three non-probability sampling methods, the researcher concluded purposive sampling that would allow him to recruit the key informants, domestic workers, and employers of domestic workers, is the most appropriate for this research. It

would assist the researcher in gathering the crucial data that is needed to achieve the goal of the thesis.

#### **4.10. PARTICIPANT RECRUITMENT**

According to Patel et al. (2003), participant recruitment is partly dependent on the type of study undertaken. It follows that various techniques could be used to recruit participants for research purposes (Miller et al., 2010). Amongst the well known recruitment methods are:

- 1) Snowball – this involves the random sampling of individuals drawn from a given finite population (Goodman, 1961; Heckathorn, 2002). The key characteristics of snowball technique are that the researcher only needs to identify someone who meets the criteria for inclusion in the study; in the hope that that person will recommend others who he/she knows also meet the criteria.
- 2) Critical case sampling – this method permits the logical generalisation and maximum application of information to other cases because of the assumption that the situation in one sample could be generalised to the other samples; provided the variables remain the same (Patton (1990).
- 3) Combination or mixed purposive sampling – this includes a mixture of random purposive sampling, stratified purposive sampling, and maximum variation sampling (Patton, 1990: 182 – 183).

Considering that the essence of the current research is to understand the impact of law on the problems faced by the ODWs who are mostly invisible to the public, the researcher concluded that the best method of participant recruitment in this study is snowball sampling. This method allowed the researcher to identify and recruit the right persons with the appropriate information that is relevant to the research. With the researcher' well established

connection with the union of domestic workers and the network of law centres and citizens advice bureau in London, the researcher was able to make contact and recruited some domestic workers as well as some informants.

#### **4.11. THE RESEARCH**

The empirical research took place in Greater London; not simple because it was convenient for the researcher but, more specifically because London is the base of the majority of the user group and the key informants. Among the identified user group for this research are the Home Office, the Justice for Domestic Workers, Kalayaan, the Poppy Project, Salvation Army, the Metropolitan Police, Unite the Union, Oxfam, Anti-Slavery International, and the Citizens Advice Bureau. The researcher' established links with leading law centres in London was invaluable to this research; most especially when it come to participants recruitment. The research involved two focus group discussions. The first discussion that aimed at understanding the problem(s) facing the ODWs and what the legal practitioners believed to be the current state of affairs of the law was with a group of lawyers. The second discussion that aimed at understanding the lived experience of the workers was with a group of domestic workers (in private and diplomatic households). Further, the researcher conducted a two-stage, fifteen one on one interviews. At the initial stage of the interview, the researcher interviewed five domestic workers, one legal informant, and one non-legal informant. The data obtained from the interview and focus group discussions were preliminary examined to determine what key legal issues has emerged. The legal issues that were identified, informed the questions that was put to eight newly selected ODWs at the second stage two of the empirical research. While in total, there were only two focus group discussions and fifteen individual interviews, the number of interviewees is not as important as the volume and richness of the data that was obtained (Baker and Edwards, 2012).

Further, given that qualitative research is not about statistic but whether the data that obtained is saturated such that the collection of new data would not shed anymore light on the subject matter (Glaser & Strauss, 1967), the researcher ascertained that the data obtained from the interviews and focus group discussions was adequate, saturated, and served the purpose of the thesis. Meanwhile, the data relied upon to understand the perspective of the employers of domestic workers was obtained with permission from the UK Data Archive. This trustable and reliable archive is the UK's largest collection of digital research data in the social sciences and humanities.<sup>6</sup> The data downloaded from the archive relates to a 2002-2006 original study entitled 'Market for Migrant Domestic and Sex Workers'. The project which aimed at examining the demand for migrant domestic and sex workers in Spain and UK, was led by Professor Julia O'Connell Davidson of the Nottingham University and Professor Bridget Anderson of COMPAS, University of Oxford. Although the last interview in the study was conducted in 2004, there is nothing significant to suggest the perceptions of the employers is no longer be relevant. In any event, irrespective of the age of the employers' interviews, it stood as a check and balance in understanding and auditing the perspective the ODWs (Flick, 2014). Accordingly, the data provided a unique opportunity to understand the plights of domestic workers from the perspective of those who employ them.

#### **4.6. DATA STORAGE AND ANALYSIS**

“Organising data in a rigorous, standardised way is essential to their security and to the validity of the study results” (Mack et al., 2010: 83). Data from the empirical research were securely stored in a folder on the researcher's computer that is password-protected (Miller and Yang, 2007). For security reason, a copy of the data was stored in a secured data archive (Khurshudov, 2001).

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<sup>6</sup> See the UK Data Archive 2002-2013 University of Essex. <http://data-archive.ac.uk/> last accessed August 6, 2015

With the aid of NVIVO 10, a comprehensive guide to the world's most popular qualitative data analysis software (Edhlund and McDougall, 2013), transcripts of the 30 interviews with the employers of domestic workers was stored and prepared for analysis. Next, the researcher stored the data obtained from the focus group discussions and the one-on-one interviews. The data from the interviews with the employers was the first to be analysed. The researcher then analysed the opinions of the informants. Lastly, the researcher analysed the perspective of the domestic workers. Unlike in the focus group discussions and the one-on-one interviews, the research held no field notes to support the transcripts of interviews that different researchers conducted with the employers. The process of analysing data involves reading and decoding the texts, as well as “shifting from a literal reading to data interpretation” (Mason 2002: 92). To pave the way for the data analysis, the researcher read, re-read, and digested the interview and focus group transcripts. The three different modes of reading the text embedded within qualitative data include literally, reflexively, and interpretively (Miller and Crabtree (1999b). Reading the transcripts over and again allowed for the identification and the literal categorisation of what the participants said during the interview, including the specific answers given by them to the researcher’s questions.

Using a thematic analysis approach (Fereday and Muir-Cochrane, 2006), the research data was individually analysed using a combined deductive and inductive method. According to Burnard et al. (2008), the deductive approach involves using a structure or predetermined framework to analyse data; whereas, the inductive approach involves using the actual data to derive the structure of analysis or simply analysing the data with little or no predetermined theory, structure or framework. Starting with the deductive approach the transcripts were broken down into smaller units (Asheim, 2010), which the NVIVO software refers to as codes. These codes represent the remarks or the participants’ responses to the researcher’ questions.

The codes were then combined according to the context in which they had been made. The researcher grouped the answers to the same interview questions together to observe for patterns. The answers given to specific questions were critically analysed to see if there was any variation in the responses given by the British employers and the non-British employers. The researcher individually analysed the focus group discussions with informants and domestic workers, as well as the individual interviews with informants and domestic workers. Drawing together, comparing and contrasting participants' responses to the same interview questions is a good starting point for coding and analysis (Miles and Huberman, 1984). In addition, the examination of responses from the individual participants when compared, gives a cross-sectional coding of similarities and differences (Doyle et al., 2006). This falls in line with the ontological and epistemological standpoint because what people say can constitute knowledge about their opinions, values and the meanings they attribute to something (Williamson, 2000). The researcher's field note played an important role in the understanding and the interpretation of the emerging codes. According to Ribbens and Edwards (2000: 10), to engage with as many people as possible required 'considerable sensitivity' to how and when participants wanted to respond.

The essence of the field note is that it helps the researcher to uncover patterns, understand the participants' answers and remarks, and to adopt a clear focus. As such, the researcher's field note that detailed the manner, gestures and approach taken by the participants to his questions, provided an excellent analytical tool for the data. By cross-referencing the interviews with the field notes, the researcher was able to challenge his impressions and create an analytical narrative built on both sources. Nevertheless, the researcher was careful not to code or analyse his own field notes because it contained his observation. The breaking down of the data to codes allows recurrent themes and "theory to emerge from the data" (Strauss and Corbin 1998:12).



The codes, which are often referred to as free nodes (small nodes), were submerged into tree nodes (bigger nodes) to give it a category. This approach sheds light on the broad responses to the interview questions and, by extension, aspects of the research questions. The approach also allowed some of the similarities and differences between the views of the participating groups to emerge. The development of the coding and the categories was progressed by returning to the original transcripts to include where participants discuss those categories less directly and not necessarily in response to a particular question (Glaser and Strauss, 1967). This stage of the coding served to refine and crosscheck the categories, and ensured that the researcher had thoroughly read, digested and coded all of the data (Saldana, 2008). This level of indexing clarifies how frequently particular categories and themes appear, from whom, and in which contexts. In the view of Strauss (1987: 27), ‘‘any researcher who wishes to become proficient at doing qualitative analysis must learn to code well and easily’’. A circular process of returning to the data and the creation of the cross-sectional coding enables the refinement and clarification of the categories. The outcome of these coding and categorisation stages was the emergence of the themes (Kelle et al., 1995).

Organising the data thematically, as opposed to chronologically, fits the thesis aims because the issues the researcher sought to explore were constituted thematically (Lee and Fielding, 1996). Concepts and themes such as the concept of vulnerability and precariousness, the effect of immigration and employment law, the relevance of the ODWs’ visas, and the impact of socio-economic background interweave throughout the research. The initial categories served as a guide for further analysis and inferential readings of what participants said and did (Gregg, 2012). Systematic reading and cross-sectional coding helped to solidify the themes that emerged deductively. The re-grouping of these key themes that gave rise to the generation of theory is referred to as framework analysis (Miles and Huberman, 1994).

Thus, to keep the data analysis within the meaningful parameters of the complexity and nuances of real life, further readings of the data was done to allow for a more holistic induction (Ritchie and Spencer, 1994). This involved detailed reading of the data, searching for patterns, associations, concepts, aided by visual displays and plots, then pulling back to interpret it in relation to other factors; such as socio-economic factors and legal discourses. The aim of such exercise is to define concepts, map the range and nature of phenomena, create typologies, find associations within the data, provide explanations or develop strategies (Lacey and Luff, 2009: 15). These different approaches to coding and categorising allowed a different perspective of the data to develop (Radwan, 2009). The legal research used critical content analysis method to explore policy documents, statute book, and legal publications that relate to ODWs. Also, using case study method, the researcher examined case laws that are relevant to the plight of ODWs, with particular attention to the rule of interpretation. Lastly, publications and court cases from other parts of the world were explored using a comparative legal analysis method (Michaels, 2006).

#### **4.14 CONCLUSION**

This chapter, which builds on the review of literature, has explored the relevant theoretical frameworks for the research and concludes the layer of vulnerability framework is the most appropriate for the current research. This chapter outlines various methodological principles, different methods of legal and empirical research, and attempts to justify the decision to use multidisciplinary method in the exploration of the problems of domestic workers in the UK. The chapter also attempts to justify why the ethnographic phenomenological approach is the most appropriate empirical research method for this research.

## **CHAPTER FIVE**

### **The Empirical Research – Method, Recruitment, Analysis, Report of Key Findings, and Thematic Analysis**

#### **5.1 AIMS OF THE CHAPTER**

This chapter intends to conduct an empirical investigation into the problems of domestic workers in the UK through the perspectives of the workers, their employers and some key informants. This chapter will also highlight the key findings of the research.

#### **5.2 THE EMPLOYERS PERSPECTIVE**

The data relied upon is based on the original data downloaded from UK Data archive. This thesis would conduct a secondary analysis of the data which was conducted, analysed, and published by different authors (Hinds, Vogel and Clarke-Steffen 1997). The previous data analysis and publication took a different perspective and arrived at a conclusion, which was different from the focus of the current research. The published research outcome discussed the market for domestic workers and argued that migrants are still relevant in the domestic work labour market. But, it did not put any emphasis on the attitude of the employers of domestic workers towards their employees. This aspect, which is highly relevant to the current research could shed light on the lived experience of the workers. Although the survey was extended to cover six countries around the world (including the UK), of utmost importance is the participation and the survey response of British employers and other employers of domestic workers. The benefit of using this secondary data is that it saved this research, the time and efforts (Bishop, 2007; Moore, 2006) that would have been made to obtain such a rich data that was collected by Professors Julia O’Connell Davidson and Bridget Anderson who are well known and respectable researchers.

### 5.2.1 EMPLOYERS INTERVIEW SCHEDULE

The UK Government argument that there is no shortage of domestic workers in the UK <sup>1</sup> was directly put to test by the survey on the employment of domestic workers in private households. The survey questionnaire contained thirty-five standardised questions. A questionnaire is standardised if each participant is asked similar questions.<sup>2</sup> Questionnaires are not amongst the most frequently used qualitative research method (Wood, 2006). Yet they are useful tools in collecting information from a wider sample (Creswell, 2003) that qualitative researchers could benefit from. The questionnaire was administered by post, which according to Parker and Dewey (2000) are acceptable methods of gathering data. Some aspects of the Respondents answers were followed up telephone interview. However, given that survey through posts can also be used in quantitative research (Stone and Desmond, 2007), to ensure that rich qualitative data are gathered, the questionnaire was designed to collect exploratory information (Crawford 2007). Whilst some of the questions were closed ended, others were open ended questions that allowed participants to explain, elaborate or give their answers in their own way (Roulston, 2009).

### 5.2.2 BACKGROUND QUESTION

The first five questions that concentrated on the participants' personal details was aimed specifically to settle the participants into the study, but more generally to generate essential data that would assist in describing and categorising the participants according to their nationality, sex, age, ethnic background, educational level, marital status and family size.

**Question 1. Please state your nationality .....**

**Question 2. Please state your occupation .....**

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<sup>1</sup> Home Office, *Impact Assessment Changes to Tier 5 of the Points Based System and Overseas Domestic Worker routes of entry*, IAHO0053, 15 March 2012

<sup>2</sup> See Siniscalco M.T and Auriat, N (2005) *Questionnaire design*, In Ross, K.N (ed), *Qualitative research method in educational planning*, UNESCO, Paris: International Institute for Educational Planning

**Question 3. Are you (please circle)**

**Male**  
**Female**

**Question 4. Please circle the age group you fall into:**

**Under 18**  
**18-21**  
**22-30**  
**31-40**  
**41-50**  
**51-60**  
**61-70**  
**71+**

**Question 5. Please circle your current living arrangements:**

**Single**  
**Married, living together**  
**Married, living apart**  
**Co-habiting with man**  
**Co-habiting with woman**  
**Divorced**  
**Widowed**

To categorise the participants' family size, and more importantly, to understand whether having children in the family has anything to do with the employment domestic worker(s), the questionnaire asked:

**Question 6. Do you have any children living with you?**

**Yes**  
**No**

**If yes, please write their ages.**

Whilst questions 7 and 8 dealt with ethnicity, religion, and nationality; to probe the suggestion in the literature that the majority of those who employ live-in domestic workers are the affluent in our society (HRW, 2014; Macklin, 1992; Sarti, 2005), questions 9 and 10 explored the connection, if any, between family income and the employment of maids or house helps.

**Question 9. Please circle which of the following income groups your family falls into:**  
*[The figure stated varies according to the country where in the interview was conducted].*

- i) Low (e.g. under £18,000)
- ii) Middle (e.g. £18,000 - £30,000)
- iii) Upper middle to very high (e.g. over £30,000)

**Question 10. Please describe your current employment situation by filling out the boxes below for each worker you employ. [If you are currently employing more than 4 people in your home, please continue below the table.]**

	Live-in	Live-out	Gender	Age	Nationality	Job title	Pay per week	How initial contact made
<b>Worker 1</b>								
<b>Worker 2</b>								
<b>Worker 3</b>								
<b>Worker 4</b>								

### 5.2.3 EMPLOYING DOMESTIC WORKERS

The assertion by ILO (2013) that the vast majority of domestic workers around the world is unprotected under general labour law and are highly vulnerable to exploitation is shared by academics and NGOs (Albin and Mantuvalou, 2012; Oxfam and Kalayaan, 2008; UN, 2012).

To set the scene and without putting the participants in the frame, the questionnaire first explored what the participants knew about the rights of domestic workers. The response provided by the participants to questions 14-16 allowed the researcher to picture the factors that could affect the relationship between the employer and the domestic worker.

**Question 14. Which of the following do you consider should be rights for all domestic workers?**

- Paid maternity leave
- A written contract of employment directly with employer
- Discipline the children as they see fit
- Sick pay

- **Written contract with their agent**
- **An annual visit home**
- **Trades union membership**
- **Regular days off**
- **Holiday pay**
- **Use their employer's telephone**
- **Pension**
- **Minimum wage**
- **A work permit (if come from abroad)**
- **Fixed hours of employment**
- **Change employer with one month's notice**
- **None of the above – it's up to individuals to negotiate**

**Question 15. Which if any of the following would you consider legitimate additional rights for live-in domestic workers?**

- **Their own room**
- **Use their employer's telephone**
- **Bring boyfriends (?) to the house**
- **Eat employer's food**
- **Use the house as their own**
- **None of these**

**Question 16. Do you believe that paid domestic work should be monitored / regulated?**

- **No, most employers can be relied on to give them their rights**
- **No, it's up to individuals to negotiate depending on their own situations**
- **Yes**
- **None of the above**

There are various reasons why people employ domestic workers (Anderson, 2007). To shed light on this issue, from the list of reasons that are available in the literature, the participants were asked to select three best statements that represented their reasons for employing domestic workers. The downside of this question is that it did not allow the participants to tick outside the box, or allow them to provide the reason(s) in their own word.

**Question 17. Looking at the following statements, which for you are the THREE that best describe your reasons for employing a domestic worker?**

- **Child/elder-care available when I need it**

- **Allows me to go out to work**
- **Increases household security**
- **Allows me to entertain**
- **Stops arguments over housework**
- **Allows me to have more time with children**
- **Allows me to have more time with partner**
- **It's impossible to live without one**
- **It's cheaper than other options available**
- **Keeps the house clean and tidy**
- **Gives me some company in the house**

Evidence in the literature has suggested the vast majority of those employed as domestic workers are female (HRW, 2014; ILO, 2013; Schwenken et al., 2011). To probe this aspect, the questionnaire asked the participants view on the employment of male domestic workers.

**Question 20. Would you ever consider employing a male domestic worker?**

- **Yes, but only as a cleaner**
- **Yes, but only as a carer**
- **Yes as both cleaner and carer**
- **No.**

#### 5.2.4 WHY MIGRANTS

In addition to the natives, migrants, especially those from countries outside the European Union (EU) are engaging in domestic work in the UK and EU countries at large (Anderson, 2000; Lutz, 2012). The questionnaire relied on the argument in the literature that employers prefer the employment of migrants to the natives. The questionnaire also assumed the participants have employed migrants as domestic workers instead of the national workers, and sort to clarify the employers' attitude towards migrant domestic workers. This question would have perhaps been asked different if a face to face interview has been conducted. Nevertheless, it remained a valid question and the participants had the option to ignore it if they did not agree with any of the listed reasons (Parasuraman, 1991).



**Question 27. Using the list below please tick THREE reasons for employing a MIGRANT as a domestic worker.**

- They are prepared to work flexible hours
- They are more caring than locals
- They cost less than locals
- They need the opportunity more than locals
- They are more suited to domestic work than locals
- They do not get distracted by family and friends
- They are more hardworking than non-migrants
- They are more likely to stay for a long time
- They are more willing and co-operative
- It's more fashionable to have migrants
- Migrants are the only workers available for this job
- They don't gossip as much as locals
- It is easier to share your home with a migrant than a local
- You avoid bureaucracy by employing a migrant
- Migrants have greater incentives to work

**Question 28. Would you say that any of the adjectives below describe the typical MIGRANT domestic worker? (NB you can go by reputation if you do not have direct experience)**

	<b>Nationality X domestic worker</b>	<b>Nationality Y domestic worker</b>
<b>Professional</b>		
<b>Attractive</b>		
<b>Shy</b>		
<b>Enthusiastic</b>		
<b>Cheap</b>		
<b>Educated</b>		
<b>Caring</b>		
<b>Feminine</b>		
<b>Obedient</b>		
<b>Dark skinned</b>		
<b>Light skinned</b>		
<b>Clean</b>		
<b>Expensive</b>		
<b>Respectful</b>		
<b>Poor</b>		
<b>Natural</b>		
<b>Young</b>		
<b>Mature</b>		
<b>Friendly</b>		
<b>Independent</b>		
<b>Assertive</b>		
<b>Hardworking</b>		

<b>Intelligent</b>		
<b>Innocent</b>		
<b>Attentive</b>		

**Question 29. How would you rate non-migrant and migrant domestic workers in forms of the following?**

**Cost**

	<b>Very cheap</b>	<b>Cheap</b>	<b>Average</b>	<b>Expensive</b>	<b>V. expensive</b>
<b>Local</b>					
<b>Migrant</b>					

**Reliability/retention**

	<b>V. reliable</b>	<b>Reliable</b>	<b>Average</b>	<b>Unreliable</b>	<b>V. unreliable</b>
<b>Local</b>					
<b>Migrant</b>					

**Enthusiasm**

	<b>Very hardworking</b>	<b>Hardworking</b>	<b>Average</b>	<b>Lazy</b>	<b>Very lazy</b>
<b>Local</b>					
<b>Migrant</b>					

**Dependence on employer**

	<b>Very dependent</b>	<b>Dependent</b>	<b>Average</b>	<b>Independent</b>	<b>Very independent</b>
<b>Local</b>					
<b>Migrant</b>					

### 5.2.5 TASK SHARING – DOMESTIC WORKERS AS A FAMILY MEMBER

Questions 12, 31, and 32 which asked about task sharing in the family appeared to have been designed to shed light on how household chores are distributed within the family that has domestic worker(s) (Marks, 2009; Vangelisti, 2004). It could also in a way assist our understanding of gender balance in the family (Eurofound, 2008). One of the arguments in support of the live-in domestic workers is that they are often not treated as member of their employers family (Albin and Mantouvalou, 2012; ILO, 2013).

Issues about how household chores are shared in the family has gained recent judicial <sup>3</sup> And media attention. Thus, the questionnaire probed whether, how and to what extent, the employers shared tasks with their workers.

**Question 12. Could you indicate, in general, who usually does the following household tasks in your home? If the task is usually shared you may tick more than one column.**

	Self	Domestic worker(s)	Partner	Parent/child/relative in household	No one/not applicable
Dusting					
Floor washing					
Reading to children					
Cleaning toilets					
Shopping					
Cooking					
Feeding children					
Washing the car					
Washing clothes					
Looking after pets					
Ironing					
Tidying up					

To explore employer / employee relationship further, the questionnaire asked the participants about their relationship with their domestic workers.

**Question 31. Would you characterised your relationship [with your domestic worker(s)] as**

- **Friendly**
- **Professional**
- **Friendly and professional**
- **None of the above**

**Question 32. In addition to her salary, which, if any, of the following items do you give to your domestic worker?**

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<sup>3</sup> *Nambalat v Taher & Anor; Udin v Pasha & Ors* [2012] EWCA Civ 1249

- Gifts for special occasions
- Toiletries
- Sanitary protection
- Food
- Clothes
- Toys
- Tips
- None of these

### 5.2.6 CHILD LABOUR

To probe the employers' awareness and sensitivity to the issue of child labour, which according to ILO (2013) is still a worldwide problem, the participants were asked to state the youngest age at which a person should be allowed to be paid for work in private households.

**Question 13. What is the younger age at which a person should be allowed to be paid for work in private households and what is the youngest age at which a person should be allowed to take on other forms of full time employment, such as factory or shop work?**

	Domestic worker	Other forms of employment
<b>Under 10</b>		
<b>10-13</b>		
<b>14-15</b>		
<b>16-18</b>		
<b>19-21</b>		
<b>21+</b>		
<b>Don't know</b>		

To confirm the employers' responses to the earlier question on child labour, two more questions on the employment of minors were put to them.

**Question 24. Have you ever employed domestic workers who are under the age of 18?**

- Yes
- No

**Question 25. Which of the following statement do you agree with (please tick all that apply):**

- I would pay someone under 18 to help out with light tasks

- **I would pay someone under 18 to help out on an occasional basis**
- **I would employ a domestic worker under the age of 18 if they were desperate for work**
- **I would never consider employing a domestic worker under the age of 18**
- **I would be quite happy for my daughter to be a full-time domestic worker**

### **5.2.7 TRAFFICKING FOR DOMESTIC SERVITUDE**

Trafficking for the purpose of domestic servitude is a major problem around the globe (Clarke, 2013; OSCE, 2011), including the UK (HRW, 2014). To assess the participants' knowledge on trafficking and their views on domestic servitude, the questionnaire asked:

**Question 33. Have you heard stories or reports about women being trafficked into domestic work?**

- **Yes**
- **No**

**Question 34. How do you think employers should respond if agencies offer them domestic workers whom they suspect have been trafficked into domestic work?**

- **Treat her like any other worker**
- **Employ them and pay them extra**
- **Report the domestic worker to the police**
- **Report the agency to the police**
- **Take it up with the agency**
- **Choose a different worker who has definitely not been trafficked**

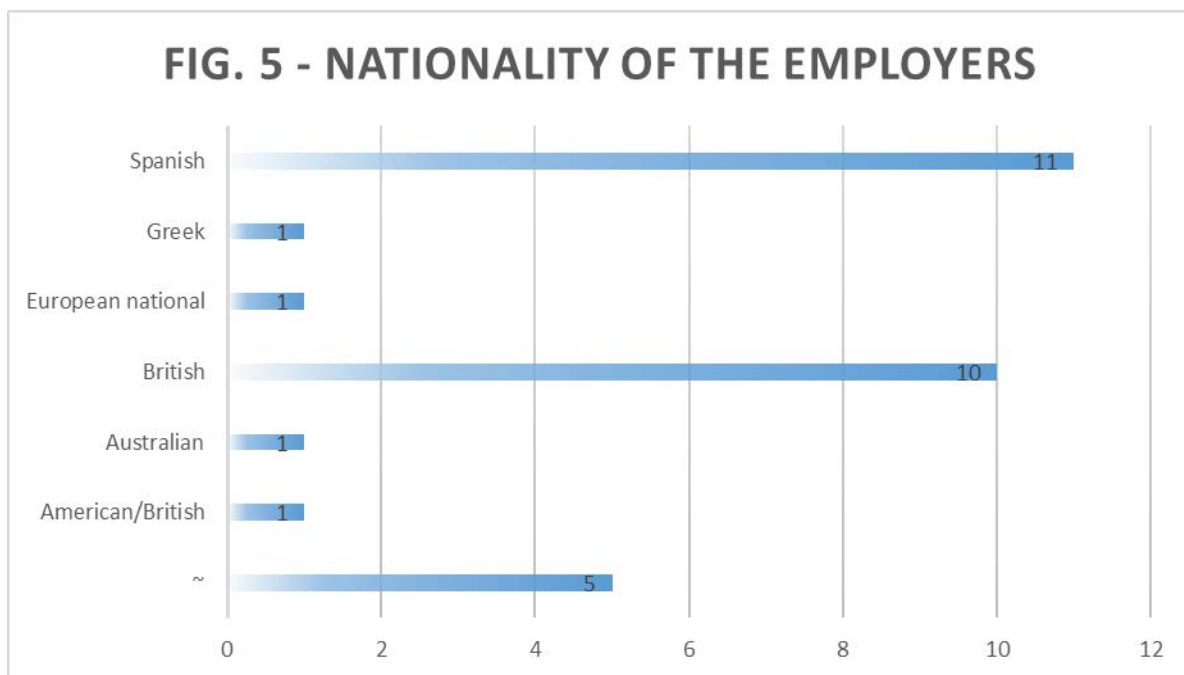
**Question 35. How do you think people should respond if they come across a worker whom they think is being violently abused by her employer**

- **Treat her like any other domestic worker**
- **Give her a tip**
- **Offer to help her escape**
- **Report it to the police**
- **Take it up with her employer**

### 5.2.8 PARTICIPANTS DESCRIPTION

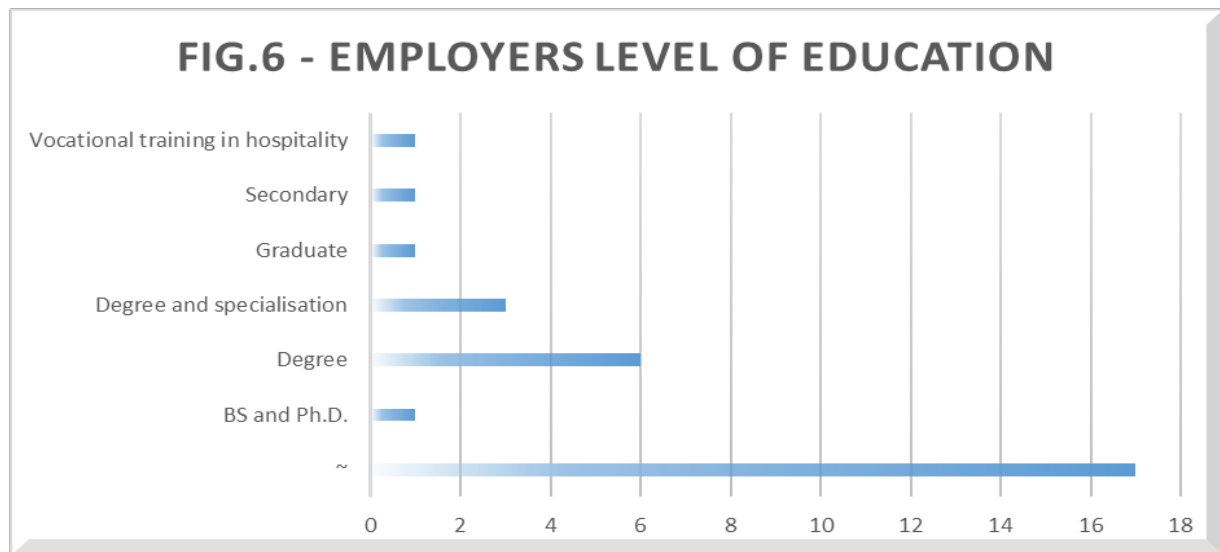
The download from the UK Data archive contained 68 transcripts of survey response and follow up interviews, but only 30 of the transcripts related to those who claimed to have employed domestic workers. Accordingly, only 30 interview transcripts were analysed.

The employers were of different nationalities. Whilst the majority of them are from Spain and Britain, the minority came from Greece and Australia (see fig 5).

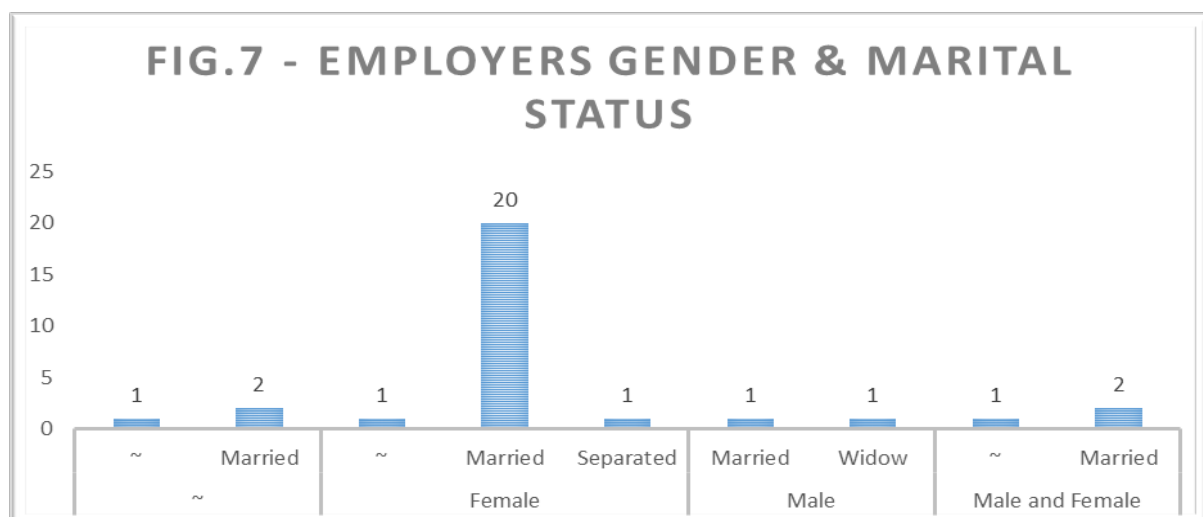


Although, some of the interviews were conducted in Spanish language, the researchers translated them into English to make it easier to analyse (Bailey, 2008). Conducting interviews in different languages is not a problem, but the issue of translation (Nurjannah, et al., 2014). The researchers who have used trained Spanish assistance to administer the survey and follow up interviews, ensured the translation inot English had equivalent meaning (Sechrest, Fay, & Zaidi, 1972). Given the credibility of the researchers, the integrity of the European Social Fund that sponsored the project, and the credibility of the UK data archive that stored the data, this thesis have no reason to doubt the translation has not been verified.

Given the nature of the survey and interview, it is fair to infer that none of the participants are illiterate (see fig 6).

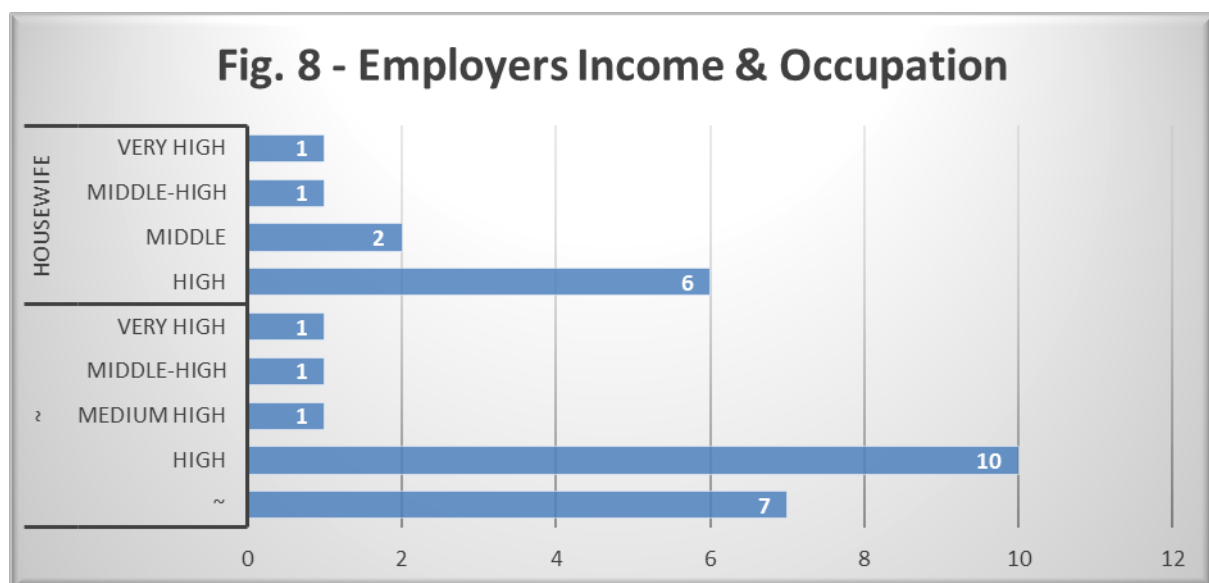


The majority of the participants were married. In relation to their gender, only five are male (see fig 7). The researchers did not provide any reason for the low numbers of male participants, but given the fact that has been established in the literature that the majority of doestic workers are women (ILO, 2013), it is not strange that the majority of their employers are also women (WEIGO, 2014).



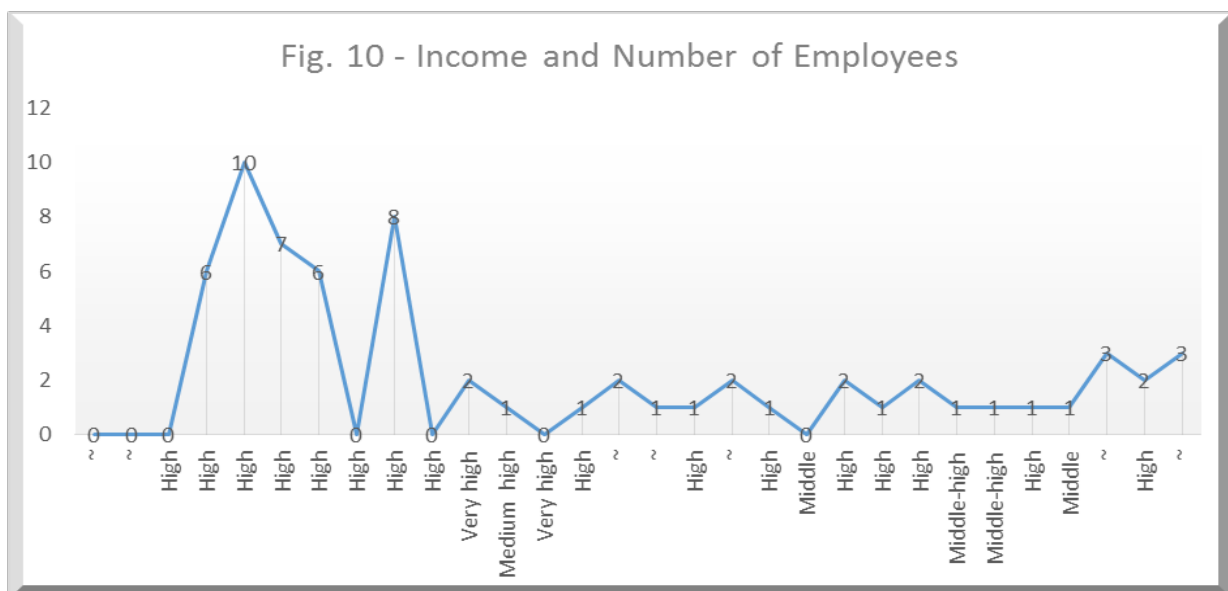
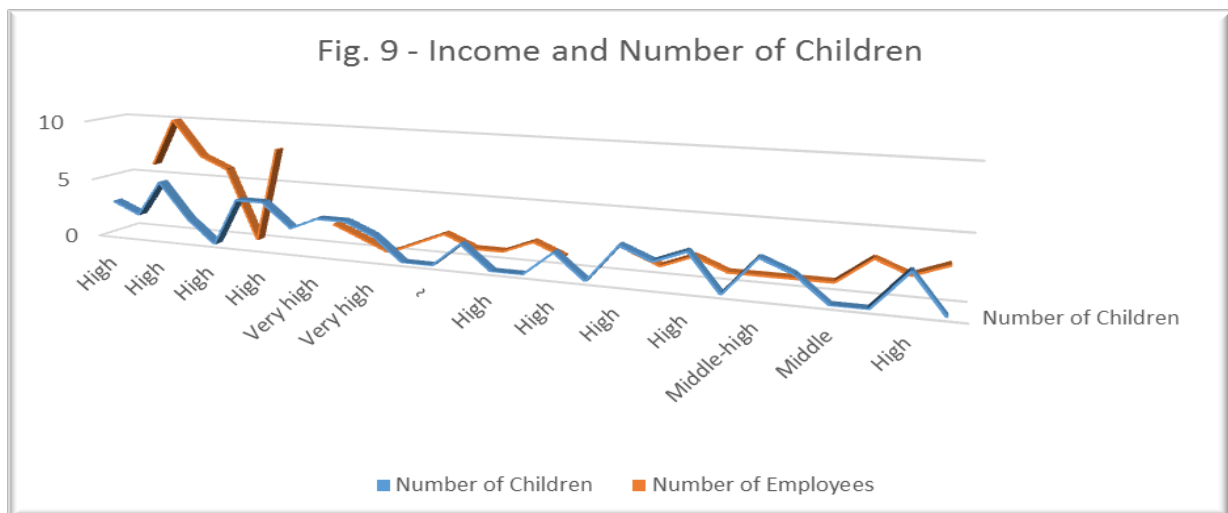
Economically, the majority of the participants are high earners. Notably, 10 of the participants who described themselves as housewives also described themselves as high earners (see fig 8).

This thesis is of the view that the participants should have been asked to clarify (Gilmore, 2011) what they meant by being a housewife and at the same time being a high earner. Perhaps the oversight of the original researchers lied in the fact that the original research mainly focus on the market for domestic workers. Since the housewives were married, it could be assumed that they have probably made reference to the ‘family income’ rather than ‘personal income’, but this assumption will not be taken further in this research. Some data on the interview transcripts were void for lack of clarity (Symth, et al., 2015). For instance, two of the participants stated that they employed ‘many’ domestic workers. As the word many cannot be quantified, that aspect of the data was void. Nonetheless, it is clear that the numbers of domestic workers employed by each of the participants varied from 1 to 10.



There appeared to be a connection between the participants’ level of earning and the numbers of children in the family (see fig. 9). There also appeared to be a connection between the level of the ‘family’ income and the numbers of domestic workers employed (see fig. 10).





Amongst the questions that were put to the participants was why, when and how they recruited their domestic workers, a description of an ideal domestic worker, how they related to their employees, their perception of domestic workers, their views on illegal immigration, and whether domestic work should be regulated.

### 5.2.9 KEY RESEARCH FINDINGS

According to the ILO (2013), 83% of the estimated 52.6 million domestic workers across the globe are women. It is also clear from the review of literature that the majority of the employers of domestic workers are women (Anderson, 2000; Delap, 2011; Todd, 2009). As such, it is not surprising that the vast majority of employers who participated in the survey and interview were women. Although one of the employers states that she simply employs domestic workers because she wanted to show her friends/neighbours who also have domestic helps that she can also afford the bill, majority of the employers, including the housewives employed domestic workers to assist with daily chores, maintain family-work balance, and provide security in the house. The data has shown that all of the employers that participated in the survey and interview could differentiate au pairs from domestic workers. Although the employers viewed both groups as immigrants, they referred to “commitment to work or serve” as a key factor that differentiates domestic workers from the au pairs. In the view of the employers, whilst the au pairs have a nonchalant attitude, domestic workers are dedicated workers.

Making a case for their employment of foreigners, all of the employers stated that they could not find the natives or those with settled immigration status to employ as ‘live-in’ domestic workers. However, they also concluded that migrants are not just available for the job, they also are the best domestic workers. None of the employers agreed they ever treated their domestic workers badly. Whilst some of the employers (Spanish employers in particular) agreed domestic workers are entitled to some labour rights, others (British employers in particular) believed it is up to the employers to dictate the rights, if any, that the domestic worker is entitled. Similarly, whilst the non-British employers agreed domestic work should be regulated, the British employers did not see any need to regulate domestic work.

Although all of the participants criticised child labour and stated that they will never employ a child/minor as a domestic worker, they were divided on the employment of illegal migrants. For some of the employers, rather than deporting the economically poor illegal migrants especially women who may have left their countries and families to look after other people's families. These employers were of the view that it would be much better to regularise the illegal domestic workers and allow them to work. Regarding the issue of trafficking, although the non-British employers acknowledged that some migrants were possibly trafficked for domestic servitude, all of the participants denied that they had ever traffic anyone for domestic servitude, nor subjected any worker to servitude. Interestingly, the British participants showed no awareness of trafficking for domestic servitude in the UK; they argued that the only trafficking issue in the UK is trafficking for sexual exploitation. Finally, the employers acknowledged their employment of live-in domestic workers is not without any detriment. Loss of privacy, theft of property, and damage to property were amongst the price some of the employers stated that they have paid for employing live-in domestic workers.

### **5.3 THE INFORMANTS PERSPECTIVE**

With the exception of one informant, the entire informants in this research have legal background as well as the experience of advising and acting for domestic workers. A combination of focus group discussion and one on one interviews were used to gather valuable data for the research. The three widely known categories of qualitative interviews are structured interviews, semi-structured interviews, and unstructured interviews (Fontana and Frey, 2005). In this research, the interviews and focus group discussions were partly semi structured (Creswell, 2003) with closed ended and open ended questions.

Kit was also partly unstructured (Patton, 2002) to allow the researcher certain amount of room to adjust the structure of the questions to be asked and to add questions based on the response of the participants.

### 5.3.1. INFORMANTS INTERVIEW SCHEDULE

The loosely structured conversation was aimed at allowing the informants to express their specialised knowledge on the worldview under investigation. This design allowed the researcher to use an interview guide (see appendix) whilst relying on his social interaction with the informants (Zhang and Wildemuth, 2009). The researcher started by asking the informants to state their profession, gender, length of professional experience, and the extent of their experience on domestic workers if any. The informants were then probed on the general issues relating to domestic workers, specifically in the UK.

#### **Question 5. Why do we need migrant domestic workers?**

*[Allow the informants to express their views on the market for domestic workers in the UK]*

#### **Question 6. Migrant domestic workers' problems**

*[First allow the informants to state what they perceive as the problems facing most migrant domestic workers in the UK – then check and probe the followings – if not mentioned by the informants]*

- a. Contract
- b. Passport
- c. Wages
- d. Tax and NINO
- e. Working Time – overtime, rest, and holiday
- f. Abuses

#### **Question 7. Undocumented Workers**

*[Explore the informants experience, view and position on undocumented migrant domestic workers. Then talk round the issue below]*

**Language Barrier – taking instructions**  
**Tribunal experience and settlement of claims**

#### **Question 8. Recent Changes to Visa**

*[Explore the informants view on the current domestic workers visa – allow then to compare the present visa with the old visa regime]*

**Question 9. Impact of immunity on illegality – The impact/effect of visas**

*[The aim of this probe is to explore the issue of illegality as it affects domestic workers' claims against their employers. Probe the link, if any with the current domestic worker visa regime and illegality – reference to decided court case(s) might be relevant].*

**Question 10. Trafficking for domestic servitude**

*[Explore the informants view on trafficking for domestic servitude – prevalence in the UK and what may be done to prevent it and support those who have been trafficked]*

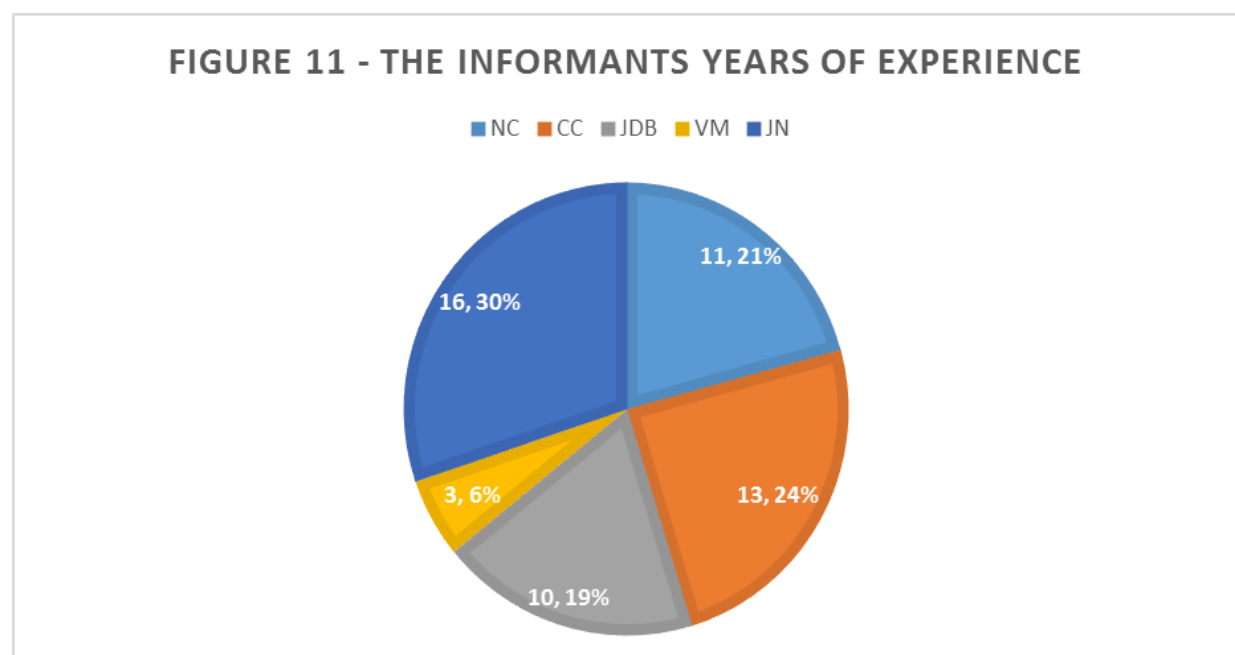
**Question 11. Could membership of a union improve the experience of migrant domestic workers?** *[Probe the suggestion by TUC in 2008 and ILO in 2013 the lack of union membership is part of key domestic workers problems].*

**Question 12. What changes would you like to see in the law that relate to migrant domestic workers?**

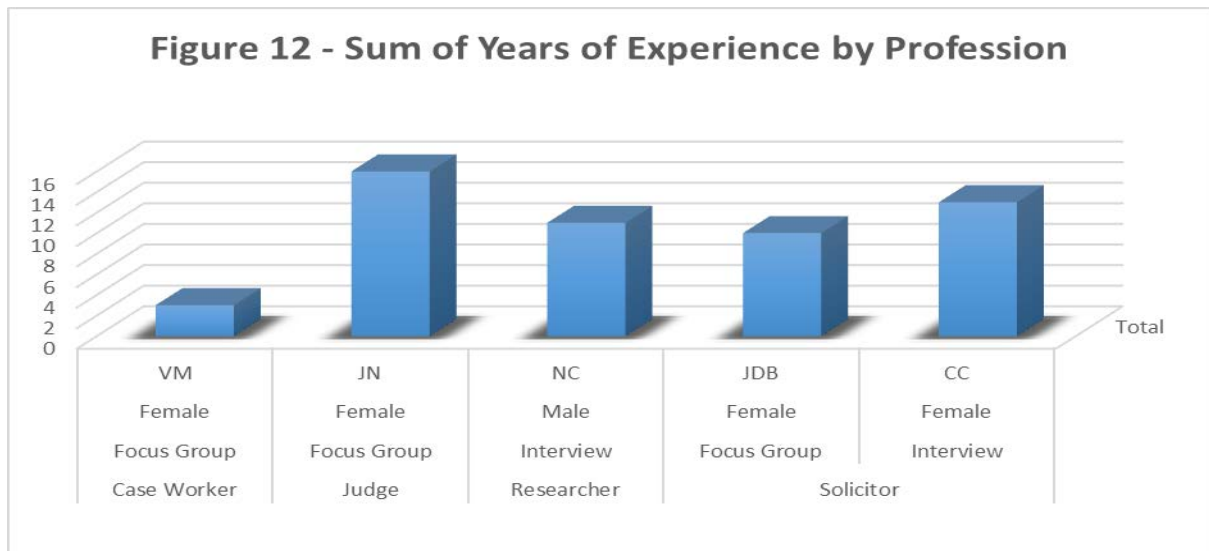
*[Allow extensive discussions on what the informants perceive as the legal problems of domestic workers in the UK and their suggestions on overcoming the legal problems].*

### 5.3.2. PARTICIPANTS DESCRIPTION

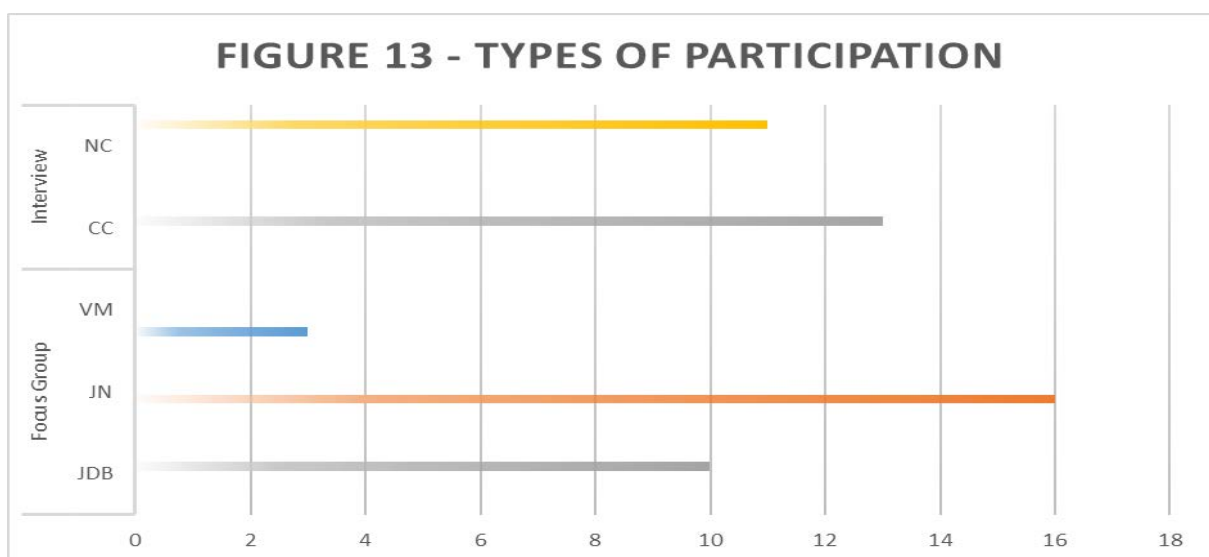
The research was conducted in the English language at locations in London that are highly convenient to the participants. Four legal and a non-legal informants, all with varying length of years of experience (3 – 16 years) working with migrant workers participated in this research (see fig. 11).



Professionally, of the five informants, two are practicing solicitors, one is a solicitor as well as a Judge, one is a caseworker, and one is a researcher/union activist. The informants were of mixed gender. Whilst one of them is a male, the rest are female (see fig. 12).



Whilst two of the informants participated in one on one in-depth interview, the rest of the informants were engaged in a focus group discussion (see fig. 13).



At the focus group, the three participants were asked to discuss the general issues affecting domestic workers and the role of the employers on the plight of the workers, if any. This was followed with an indepth discussion on the current laws that affect domestic workers in the UK and what they believed the future holds for the workers. The one on one interview was guided by semi-structured questions designed to allow the participants to comment on their perception of domestic workers and the employers, the recruitment of domestic workers to the UK, the legal position of migrants in the domestic sector, the current affairs relating to domestic workers, and the future of domestic work in the UK.

### 5.3.3. KEY FINDINGS

In the view of the informants, the only reason why employers of domestic workers preferred migrants to the native workers is because migrant could easily be controlled. The informants were of the opinion that the power imbalance between employers and the domestic workers contributes to the workers vulnerability to exploitation and abuses. All the informants criticised the UK Government continued refusal to adopt and implement the ILO Convention 189 on the regularisation of domestic work. Further, the informants condemned the current UK immigration policy, in particular, the new ODWs visa, which they suggested have made it more difficult for abused and exploited domestic workers to escape their employers. The informants also criticised the exclusion of the domestic workers from Health and Safety protection as well as their exclusion from major employment rights; such as, the national minimum wage, and the working time regulation. They agreed that a form of regulation is required to give more employment rights and entitlements to domestic workers. On the overall, the views of the informants appeared to be pro domestic workers as they criticised the employers of domestic workers for taken advantage of the workers' vulnerability.

## **5.4 PHASE I – DOMESTIC WORKERS PERSPECTIVE (FOCUS GROUP)**

Focus group, which is a well-established qualitative research method (Creswell, 2008), is a “dynamic group discussions used to collect information” (Harrell and Bradley, 2009: 6). In the view of Krueger (2002) the most important aspects of focus group discussion are the participants, the environment wherein the interview is/will take place, the group moderator, and the analysis and reporting of the discussion. All these were carefully taken into considering in this research.

### **5.4.1. THE FOCUS GROUP SCHEDULE**

The discussion guide (see appendix) was designed with very few probes bearing in mind that many people are engaged in the discussion and time management. Before starting the discussions, the researcher greeted, welcomed, and thanked the participants for volunteering. He then formally introduced himself and the research; ensuring that the volunteers have all freely and willingly consented to the research. To settle the participants, the researcher gave them a very short survey questionnaire to complete. The survey asked for their personal details – name, age, nationality, marital status, years of experience as a domestic worker, whether currently employed, and type of visa if any. The researcher appointed a moderator from amongst the participants before negotiating the house rules with the participants. “The moderator takes an active role in controlling not only the topic but also the group dynamics” (Hyden and Bulow, 2003: 307). The key questions explored were:

#### **Question 1. General introduction**

***[Ask participants to introduce themselves by stating name and nationality]***

#### **Question 2. Why travelling abroad, why the UK**

***[Explore the individual’ reason for travelling, whether they came directly to the UK, the purpose of coming to the UK, how long they have been in the UK, any play of going back home. This should be done in no particular order].***

#### **Question 3. Why work as domestic worker**

***[Dream job, learned trade, no other choice]***



**Question 4. Positive experience in the UK**

*[Benefits, enjoyment, socialising, bring family members over to the UK etc.]*

**Question 5. Negative experience in the UK**

*[Follow up negative experience with further questions using the participant's answer as a guide, but be mindful of emotional, ethical and privacy issue]*

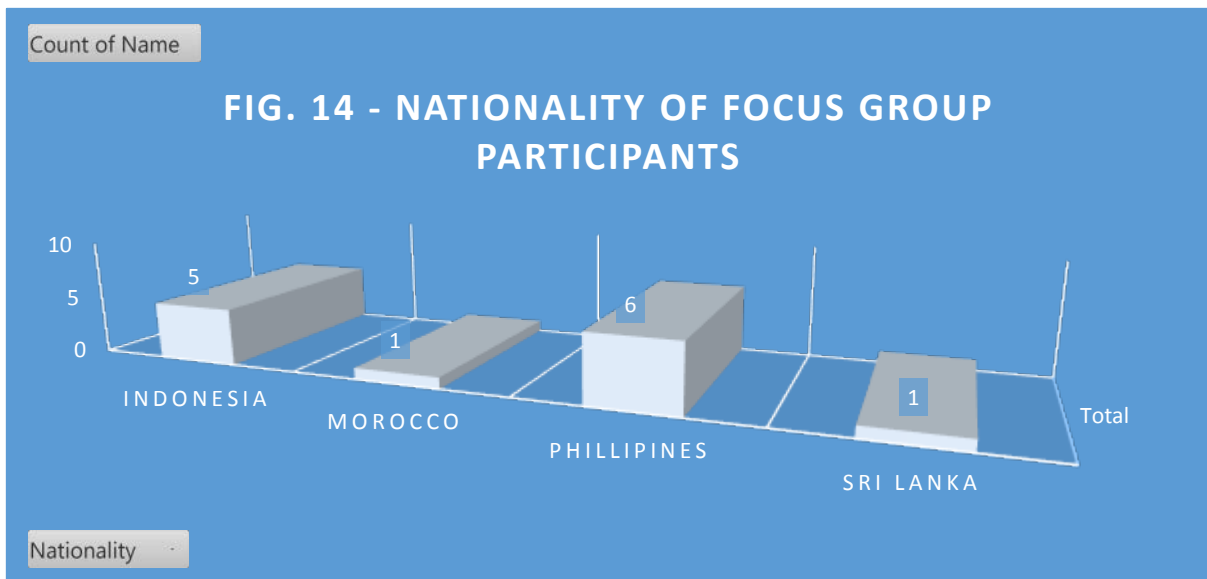
**Question 6. Summary and conclusion – How the experience of domestic workers in the UK could be improved**

*[This might involve discussions around the current visa regime and access to justice]*

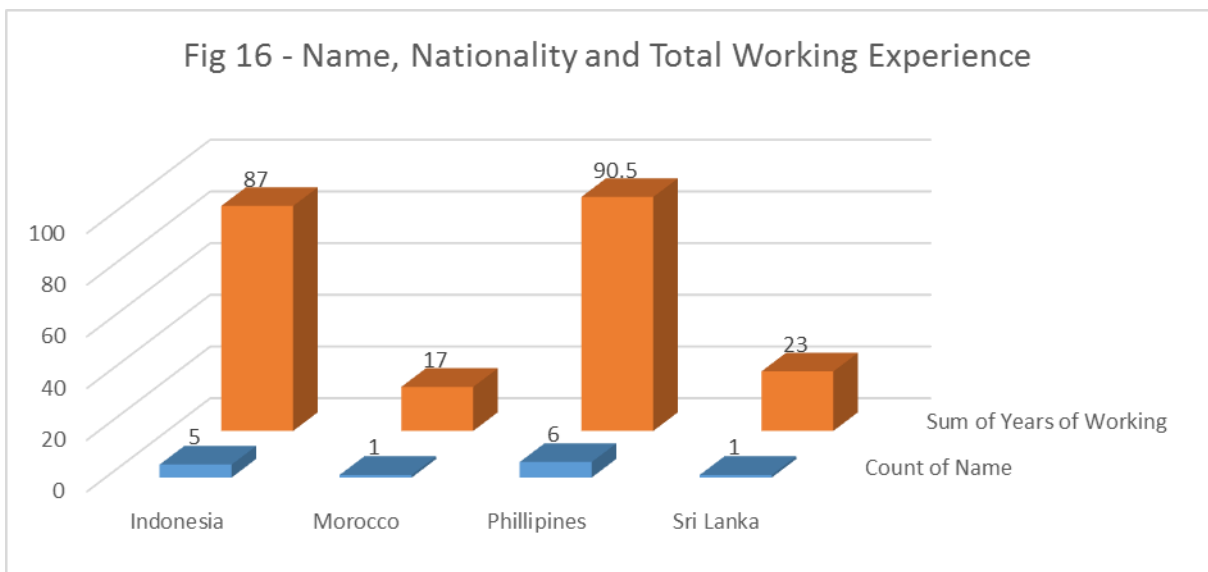
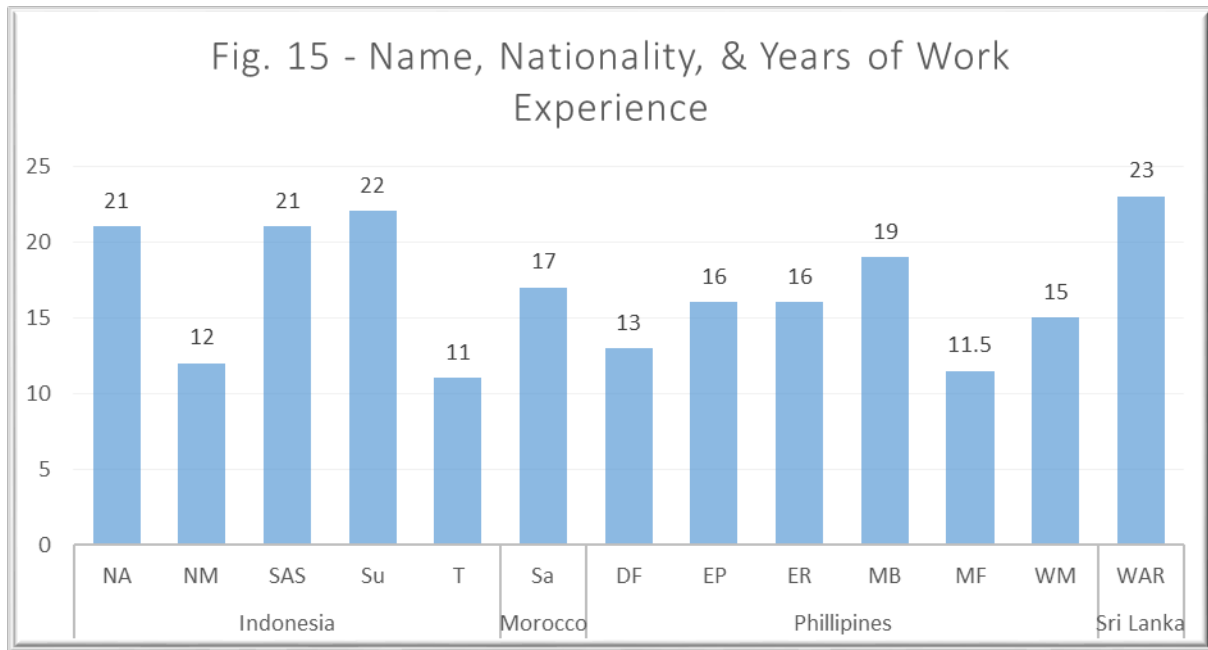
#### 5.4.2. PARTICIPANTS DESCRIPTION

Even though there have been suggestions that participants on focus group discussions should not exceed 6 – 8 (Israel, 2011; Kumar, 1987; Saphire, 2009), thirteen domestic workers participated in the focus group discussion. Seven participants initially volunteered to participate in the research, but just minutes before the focus group commenced, five other participants who have been recruited by their mates through the word of mouth showed up to participate in the discussion. The researcher viewed that turning them away could disappoint them and may affect the others who had the chance to participate and perhaps voice their concerns. According to Merton et al. (1990: 137), “the size of the group should ....not be so large as to be unwieldy or to preclude adequate participation by most members nor should it be so small that it fails to provide substantially greater coverage than that of an interview with one individual”. The moderator who is well known and respected by all the participants helped to manage the time and the flow of discussions. The entire participants, as anticipated, were foreigners with mixed immigration status. Some of the participants have obtained indefinite leave to remain in the UK, some have a temporary immigration status, and the others have no immigration status (this includes those on the new ODWs visa who have recently escaped their employers and have therefore become illegal).

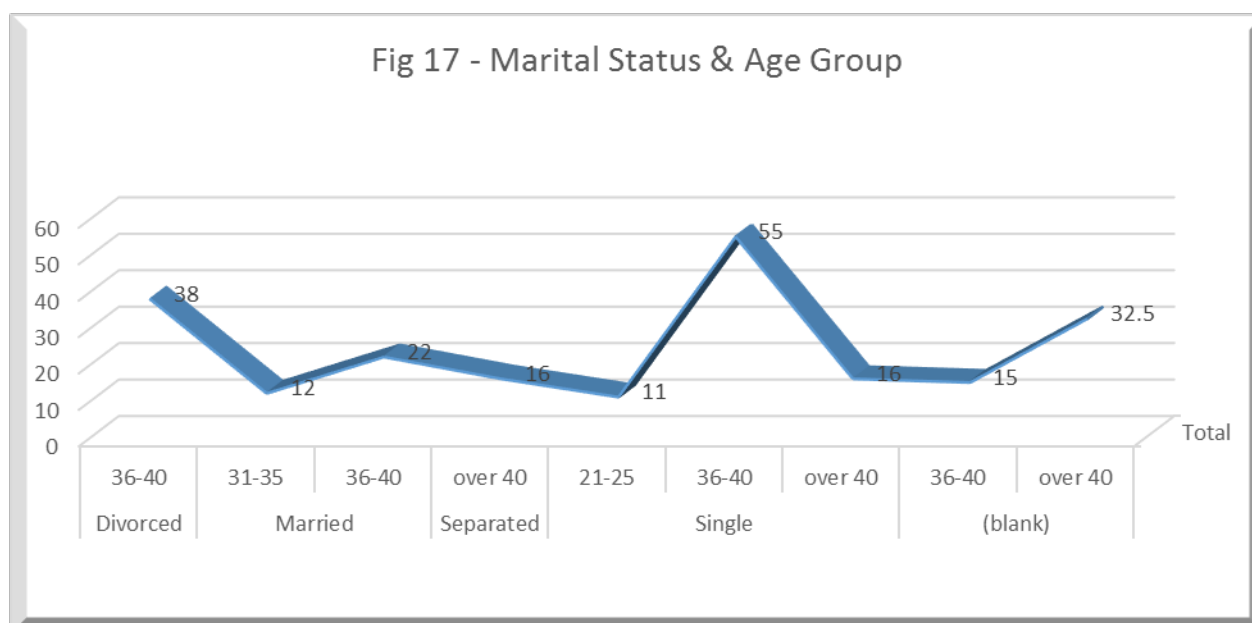
Six of the participants were from the Philippines, five were Indonesians, one from Moroccan, and one from Sri Lankan (see fig 14).



All the participants reside at different locations in and around Greater London. While a few of the participants stated that they have recently lost their job, stated that they are working as live-in domestic workers. The majority of those who stated that they recently lost their job have also worked as live-out domestic workers. Amongst those who stated that they have lost their job are those who have worked in the diplomatic households. All those who stated that they are working are employed in the private households. None of the employers had less than 10 years working experience. Their working experience ranges from 11 to 23 years (see fig. 15). In total, the Filipino domestic workers have the highest numbers of working experience whilst the Moroccan domestic worker has the lowest working years' experience (see fig. 16). Three of the participants did not divulged their marital status. However, of the 10 participants that disclosed their status, the majority described themselves as single. Similarly, the vast majority of the participants were aged between 36 and 40 years.



The vast majority who described themselves as single happened to be within the age bracket 36-40, which is the mode age (see fig.17).



#### 5.4.3. KEY FOCUS GROUP DISCUSSION FINDINGS

One of the key points that was stressed by all of the domestic workers was the socioeconomic situation in their native country that they argued ‘forced’ them to travel abroad to look for work and a better opportunity. The participants mentioned the lack of job, money, prospect, poor health facility, as well as the lack of support from partners as key factors that increased their determination to look for work abroad. The desperation to travel and the believe that life abroad would be very much better than life in their homeland, exposed the workers to trafficking, exploitation by loan sharks, as well as exploitation and abuses at their workplaces. Only a few of the domestic workers stated they were directly recruited from their country to the UK. The majority accompanied their employers in the UK from a third country. Although all the domestic workers stated they have experienced one form of abuse or the other and believed their employers have exploited them, none of them agreed that going back to their home country was a valid option. The common experience mentioned by the participants include passport retention by the employers, non-payment according to the minimum wage, lack/inadequate rest period, excessive working hours, lack of respect, non-payment of tax and national insurance dues, inadequate accommodation and feeding.

All of the participants considered their membership to the workers union at UNITE as the tool that has helped them in dealing with stress. The membership allowed them to meet and socialise with the other domestic workers, learn new skills (such as computer and IT, English language, poetry, drawing, and paintings), being made aware of their legal rights, being empowered to speak for themselves and be able to challenge the employers, and being able to participate in campaign programmes and collective actions.

## **5.5 PHASE I – DOMESTIC WORKERS PERSPECTIVE (INTERVIEW)**

### **5.5.1. INTERVIEW SCHEDULE**

The interview schedule was designed to explore the participants' background, immigration status, employment and working condition. The schedule contained questions, which were specifically designed to probe some of the issues that were raised by the informants and the issues that came up during the focus group discussions.

### **BACKGROUND QUESTIONS**

**1. What is your nationality?**

**2. What is your age?**  
\_\_\_\_\_ years old

**3. Gender**

- 1. Male**
- 2. Female**
- 3. Prefer not to say**

**4. Do you currently have a wife/husband or long-term partner?**

- 1. Yes (Continue with no. 5)**
- 2. No (Skip to no. 7)**

**5. Where does your wife/husband/partner currently live?**

**6. Is your wife/husband/partner currently working?**

- 1. Yes**
- 2. No**

**7. Do you have children?**

1. Yes (Continue with no. 8)
2. No (Skip to no.9)

8. Tell me about your children – How many are they, their age, are they here with you?

9. Have you had any vocational training?

1. Yes (Continue with no. 10)
2. No (Skip to no. 11)

10. Briefly describe the nature of vocational training received:

11. How would you assess your proficiency in speaking, reading and writing English?

Speaking	b. Reading	c. Writing
Fluent	Fluent	Fluent
Adequate	Adequate	Adequate
Basic only	Basic only	Basic only
None	None	None

12. Has this proficiency level remained the same before and after your arrival in the UK?

13. For how many years in your life have you worked, and where?

14. When did you first start work in the UK?

15. What was your employment status just before that date? (Refer to date given in 15)

16. What were your take-home (net) earnings/income/salary in that job? And what were your average working hours per week in that job?

17. Did you purposely come to work as a domestic worker in the UK or were you on a different visa?

1. Yes (Continue with no. 17)
2. No (case of trafficking?)

18. When you first entered the UK as a domestic worker how long did you intend to stay and work here?

## IMMIGRATION AND RECRUITMENT

19. How did you come to be a domestic worker in the UK?

*Objective: to explore motivations, expectations, and processes of migration.*

- What stage of life were they at (Recently unemployed? Family changes?)
- What had they been working as before they came to the UK and how much had they been earning?
- Did they choose the UK? If so, why?
- What did they imagine it would be like?
- Did they come straight to the UK or stay in other countries?
- How travelled and found employment (links between travel agencies, recruiters, employment). Were they offered work before they came?

- How did they finance the trip (loans?)

## **EMPLOYMENT AND LIVING CONDITIONS**

**20. Can you tell me about the host families and other jobs you've had while you've been in the UK?**

*Objective: to gather an employment history*

- How many host families have they had
- why did they change?
- how did they find new families?
- Casual work (cleaning, waitressing etc) as well as au pairing
- Do they go to English classes?

**21. Can you describe the work as a domestic worker?**

- type of jobs done
- hours, days, rests, holiday
- relations with the employer family
- Do you enjoy your job(s)? What is good and bad about it/them

**22. Do you have a written agreement?**

*Objective: to understand the impact of different levels of formality*

- What are the advantages and disadvantages of having a written agreement?
- What would happen to your jobs if you were sick for a month?
- What would happen if you injured yourself at work?

**23. Who holds your passport?**

- If it is anyone other than you, who holds it and how did this happen?
- Has it ever been a problem in a previous job?
- Have you ever tried to get a passport back?
- do you feel this is a problem for you?

**24. How much do you get paid?**

*Objective: to understand the "micro-economics" of individual's wage.*

- How much do you get paid for all your jobs?
- Are there deductions from your salary for travel, recruitment costs, loans, payment to employment agents, uniforms, accommodation etc? Was it clear from the outset that these deductions would be made? Do you know how much they are worth?
- Are you paid overtime?
- What non-wage benefits do you get that you know of e.g. accommodation, food, bills, insurance, health-care
- Do you feel you get a fair deal?

**25. Can you describe your accommodation at your employer's premises?**

- Do you live in with your employer family? If not, why not? What are the advantages and disadvantages of living in?
- Do you feel you can use the house as your home?
- Do you have your own bedroom?
- Is it in a neighbourhood that you like (services, people, and fellow nationals around?)
- How did you find your accommodation?
- Are you happy with your accommodation?

**26. What do you do outside work for relaxation?**

*Objective: to explore non-employment networks*

- Are you a member of any institutions or associations?
- Who do you relax with? Do you know many fellow nationals? Are they mainly domestic workers?
- Use of local leisure facilities?
- Place of worship
- Where do you go for advice/help?
- What contact with non-migrants outside work – very little / a lot
- Any contact with policy/ immigration authorities. Two authorities
- Public service
- Health
- Education
- English classes

**27. What do you think are the good and bad things about the migrant domestic worker jobs?**

- is it just another job?
- would you rather work in a different sector?
- is it easy to meet people?
- is staying with your employer a good or bad thing?
- would you recommend domestic work to your friends?
- what advice would you give to someone from your country intending to work as a domestic worker?

**28. Do you feel “at home” in the UK?**

*Objective: to discuss social capital in UK and transnational behaviour*

- Do you feel welcome in the UK:
- Would you like to stay permanently in the UK?
- How often do you contact your country of origin and how do you do so?
- Do you send money home regularly? How often? And how (Western Union, remittance company, friends)
- Have you returned home for any visits recently?
- Do you get any publications or newspapers?
- Do you go to any places to meet up with fellow nationals?
- Do you have any British friends?

**29. What advice would you offer to fellow nationals in the following situations?**

- they are not paid their wages;
- they have no standard accommodation;
- they are or become unemployed;
- they become seriously ill;
- they overstay their visa

*Objective: to explore the use (or not) of services, contact with the police, and level of control exercised by employers.*

- would they go to a solicitor or police in any of these circumstances?
- Would they access the NHS?
- Do they know about other advice agencies such as CABx?

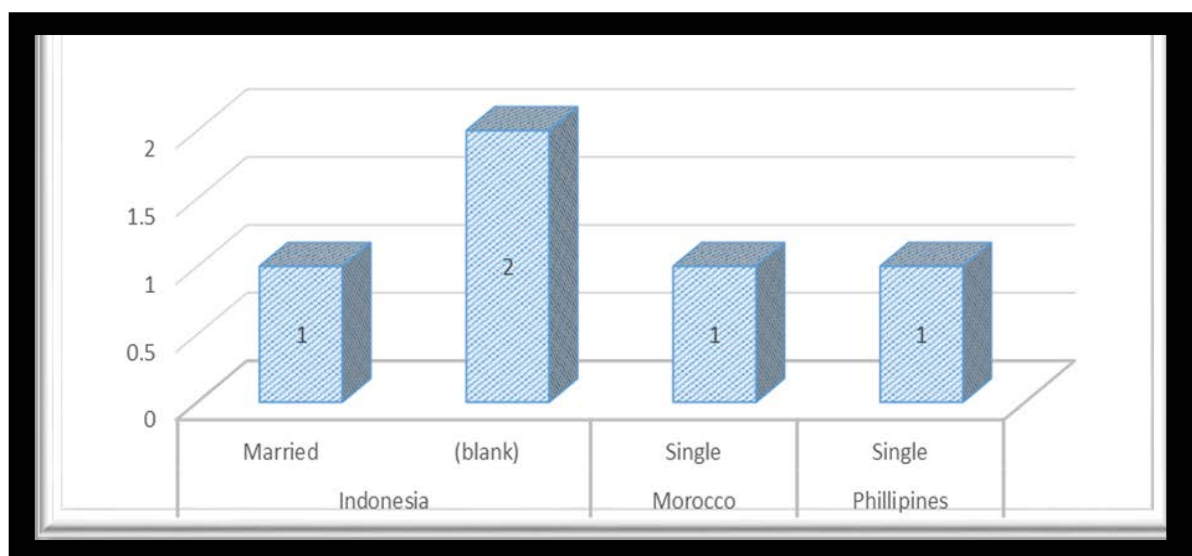


- Would they approach a trades union?
- Would they approach the Embassy?
- Would they approach the settled community, via individuals or community organizations?

### 5.5.2. PARTICIPANTS DESCRIPTION

Five one on one in-depth interview was conducted with participants at different locations in London. Three of the interviewees were from Indonesia, One was from Morocco, and one was from the Philippines (see fig. 18). One of the interviewees had worked for a diplomat before she escaped the employer. The rest were engaged in the private households. With the exception of one, all the interviewees were employed as a live-in domestic worker in the private households at the time of their interviews.

**FIGURE 18: NATIONALITY AND MARITAL STATUS**



### 5.5.3. INTERVIEWS KEY FINDINGS

The experience shared by the interviewees closely resembled those of the focus group participants. The three core themes that emerged from the interview data were power imbalance, restrictive access to justice, and trafficking.

Concerning power imbalance, the interviewees suggested whether or not a domestic worker would enjoy his/her working life in the UK depends entirely on the employers. According to them, if an employer is scrupulous, the live-in domestic worker is more likely to have a good experience, better accommodation, decent pay, and be treated as a member of the employer. However, if the employer is unscrupulous, the domestic worker is more likely to be treated as a slave, denied access to family enjoyment, denied decent pay, denied holiday entitlement, have his/her passport retained and in the worst cases, scolded and abused (mentally, physically, and sexually). One interviewee who had just escaped her diplomat employer mentioned that the Home Office has informed her that her visa would not be renewed unless she could find another diplomat to employ her. She also mentioned that upon advise, she attempted to bring a Tribunal claim for compensation against the diplomat employer, but the case hit a deadlock when the employer pleaded diplomatic immunity from jurisdiction of the court. She had been surviving on handouts from friends and charities, but she could not return to her homeland because her family was very poor and she was already in debt.

## **5.6 PHASE II – ADDITIONAL EMPIRICAL RESEARCH**

Following the review of legal and non legal literature, the review of employers survey responses and interview transcripts, and the investigation conducted with informants, it became clear that a channel has been opened on the legal problems of domestic workers that is under investigation. This second phase was intended to follow this channel with a view to putting appropriate questions to domestic workers.

### **5.6.1. PROBING LEGAL MATTERS**

The investigation so far have showed the legal problems of domestic workers are those that related to their immigration status, the right to work in the UK, inability to negotiate favourable employment agreement and working conditions, non-payment or shortfalls in

wages, trafficking for domestic servitude, impaired access to justice, working time and health and safety concerns. To shed more light on these legal problems, the researcher conducted a further empirical research to understand the perception of ODWs of these problems, and in what way, if at all the problems impact on their lived experience.

### 5.6.2. INTERVIEW SCHEDULE

To prevent asking leading questions and/or putting words into the mouth of the participants, this investigation adopted a semi structured interview schedule that allowed the participants to tell their story the way they have seen it (Brannen, 2013).

#### **Question 1. Background information**

**Objective:** To settle the participants and collect valuable descriptive data.

**Plan:** Ask the participants to tell their age, sex, marital status, place of origin/nationality, years of working as domestic worker, length of residence in the UK, and whether family is in the UK or abroad. Ask whether their employer(s) is a diplomat or private person(s). Ask how they begun to work as a domestic worker – how they get the job, whether they were employed directly from their home country or came to the UK via a third country. Lastly ask how many households they have worked for so far?

#### **Question 2. The opener**

**Objective:** To allow the participants the chance to summarise what if any, they perceive as the legal problems facing domestic workers in the UK. The essence of this is to see if the participants see law and the legal system as a problem at all

**Plan:** Ask the participants what their response would be if they are asked to summarise the problems faced by domestic workers in the UK.

#### **Question 3. Knowledge of Employment and Human Rights**

**Objective:** To explore the participants' awareness of employment and human rights in the UK and how these rights affect them.

**Plan:** Ask the participants if they have ever heard about human right? If yes, in what context? If it has not been previously stated, ask what if any, the participants know about employment right for those working in the UK private households.

#### **Question 4. Immigration status**

**Objective:** to explore whether the participants have entered the UK legally or illegally, their current immigration status, and their plan to return to their home country.

**Plan:** Ask how the participants have travelled to the UK, whether they still possess valid visa, whether they are aware that a valid authorisation is required to work as a domestic worker, how long they planned to stay in the UK, whether they are happy to return home before or at the expiration of their visa, and why? Where issue of trafficking has been raised, explore this further.

#### **Question 5. Contract / statement of terms and conditions**

**Objective:** To explore the nature and terms of their work agreement, and whether the agreement was verbal or documented.

**Plan:** Ask to the participant whether and how they have negotiated the terms of their employment contract, whether they were provided with a contract or a statement of terms and condition, whether the statement represents what was agreed, and whether the initial agreement has remained the same or have been altered in any way by the employer(s)?

#### **Question 6. Wages / salary**

**Objective:** To explore if the participants received any payment for their work, and to examine if the workers were paid according to the national minimum wage

**Plan:** Ask the participants if, when, how, and how much they were paid. Whether the payment is in accordance with their agreement? Any other payments like bonus, incentive, holiday pay, and sick pay.

#### **Question 7. Working condition / time**

**Objective:** To investigate the workers general working condition

**Plan:** Ask the participants to describe their working condition/environment, daily routine, working hours, rest period, and number of days off per week. Explore if they are obliged to remain in the household during their time of rest

#### **Question 8. Living condition / accommodation**

**Objective:** To understand the nature of the accommodation that the live-in domestic workers were offered.

**Plan:** Ask the participants to state whether they are live-in or live-out domestic workers. If live-in, ask participants to describe their employers' households, available accommodation, and whether they were provided with own/separate room. If provided with a room, whether the room has any lock.

#### **Question 9. Family member treatment**

**Objective:** To explore the work and social relationship between the participants and their employers

**Plan:** Ask the participants to summarise the relationship between them and their employers. Depending on the response, probe whether they eat together, socialise together, and go on holiday together.

#### **Question 10. Disciplinary action**

**Objective:** To explore whether employers of domestic workers often comply with statutory disciplinary procedures

**Plan:** Ask the participants if they have been investigated, warned, or dismissed by their employers. If yes, explore the events and the steps taken by the employer(s).

#### **Question 11. Abuses and exploitation**

**Objective:** To investigate some of the treatment of domestic workers by their employers that may amount abuse and/or exploitation.

**Plan:** Ask the participants whether they have been physical abused by their employers. Ask them to comment about the treatment of them (good and bad) by their employers. If the participants state that they have not been treated fairly, ask why.

#### **Question 12. Health and Safety**

**Objective:** to investigate history of work related injury and well being of the domestic workers

**Plan:** Ask if they have ever been ill or injured since they arrived in the UK. If yes, explore if this occurred whilst they are working in the households, the nature of the injury, the circumstances, and how it was dealt with. If not already mentioned, ask if they are registered with a GP and if they have used the NHS services.

#### **Question 13. Catch all Question**

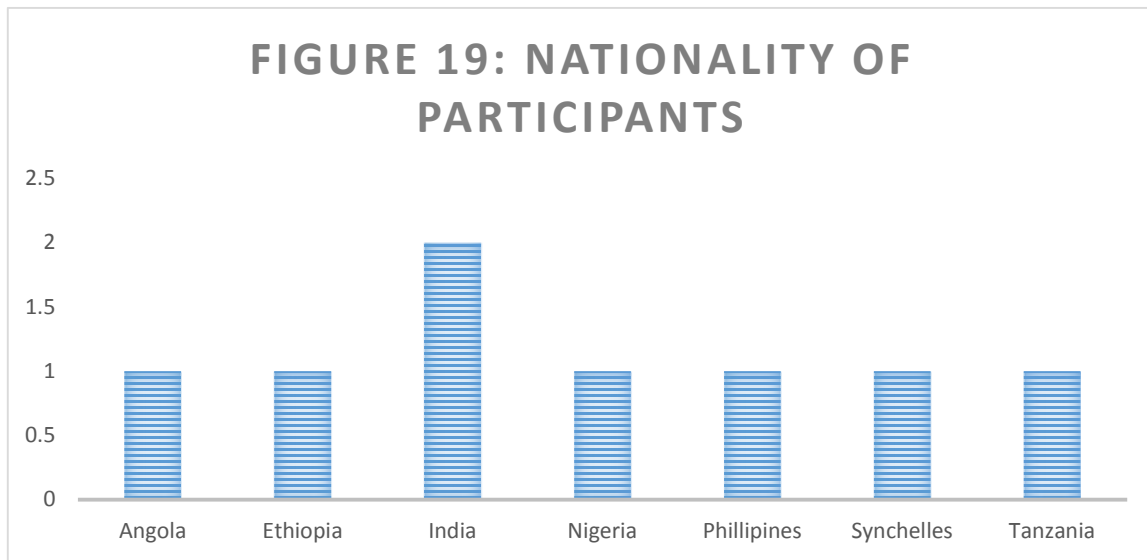
**Objective:** To ensure all legal areas has been covered and all relevant information has been explored.

**Plan:** Ask the participants if there is any aspect of UK law that affect their experience as a foreign national, and as a worker. If yes, allow them to state which aspect(s) and make them suggest how it/they could be improved.

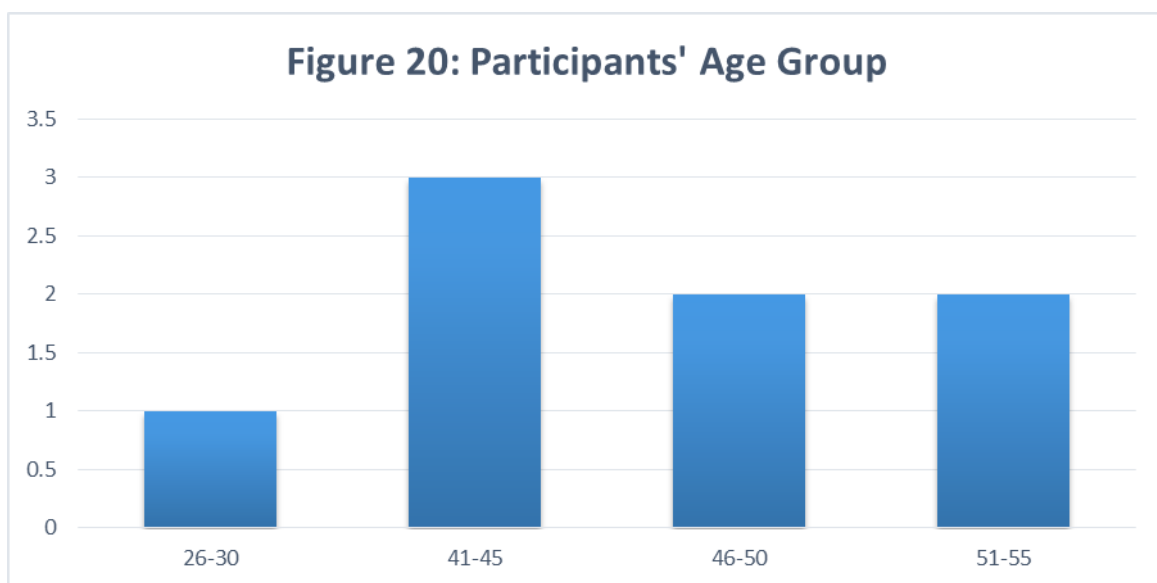
### **5.6.3. PARTICIPANTS DESCRIPTION**

Eight ODWs were recruited to participate in this investigation. The participants were strategically selected to obtain (without generalising) a broader perspective of the view of domestic workers from third countries (outside the European Union).

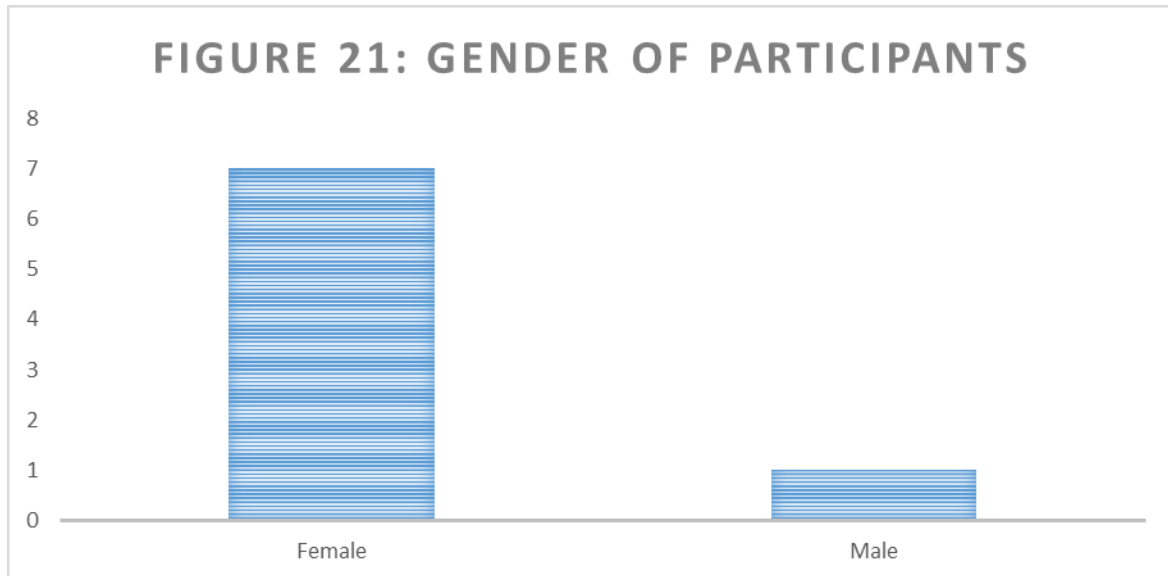
The essence of this is to ensure that the participants are non uk and non EU migrants are subject to immigration control. One of the participants is from the Philippines, two were from India, and the remaining five were from African countries, including Nigeria, Synchelles, Tanzania, Angola, and Ethiopia (see fig. 19).



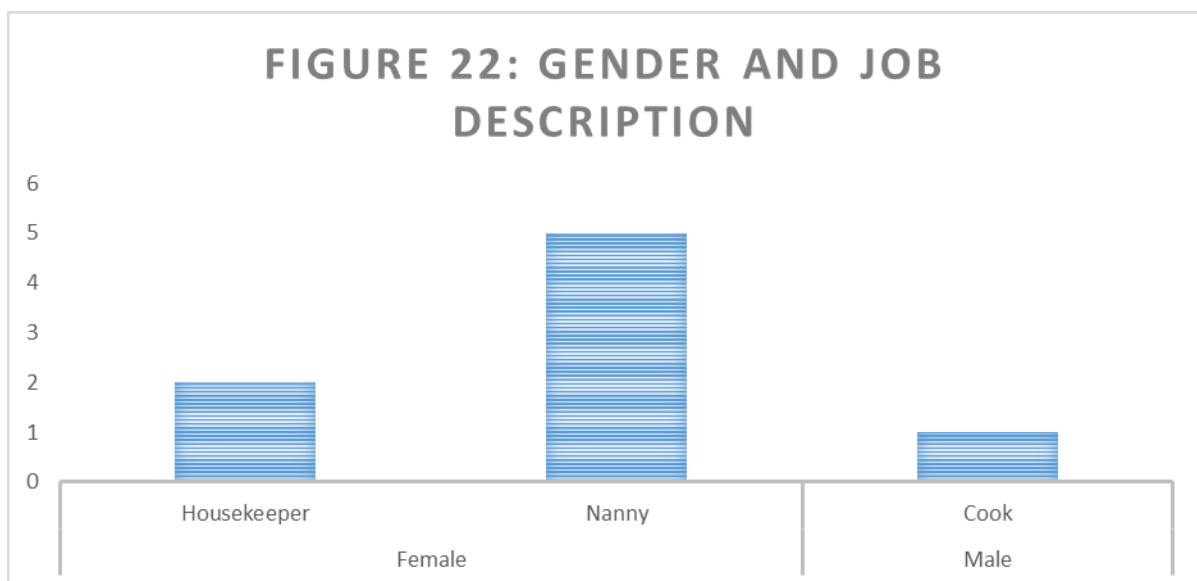
The youngest of the participant was aged between 26-30 years. Three of the participants were aged between 41-45 years, two participants were aged between 46-50 years, and the remaining two were aged between 51-55 years (see fig 20).



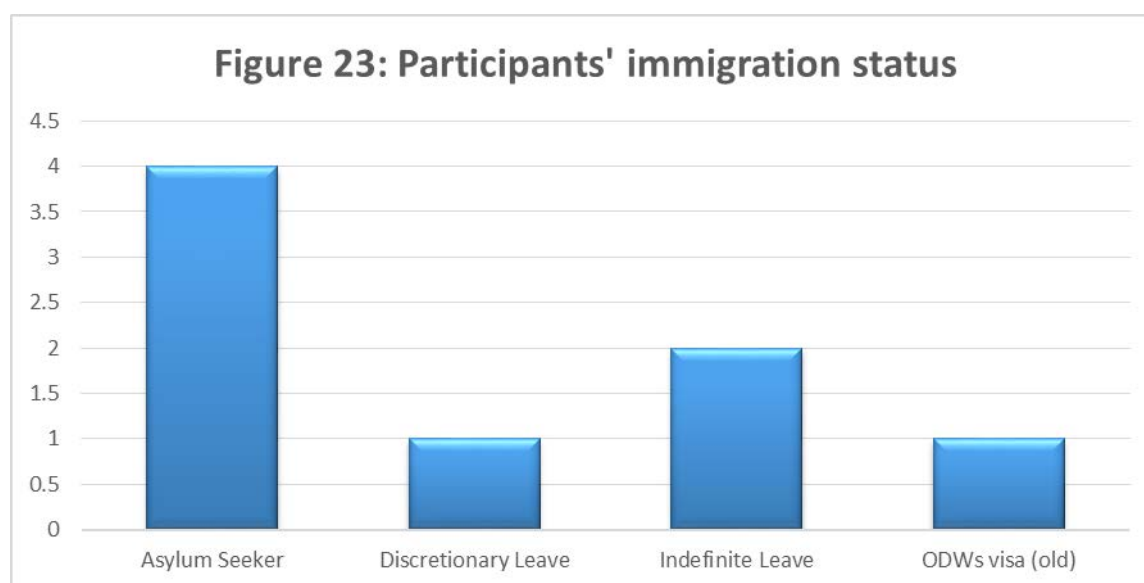
Given the trend that the majority of domestic workers are female (ILO, 2010), it is not surprisingly seven of the eight participants were female (see fig 21).



In terms of employment activities, while the male participants described his job as a cook, five of the participants who were female described their work as nanny. The remaining two participants who were also female described themselves as housekeeper (see fig. 22).



Two of the participants have been granted indefinite leave to remain after completing five years residency on the old ODWs visa. One of the participant who was also on the old ODWs visa has had her visa renewed. One of the participants has been granted humanitarian protection in the UK. But, the remaining four participants who had no residence permit, claimed to have pending humanitarian protection / asylum application with the Home Office. (see fig. 23).



#### 5.6.4. KEY PHASE II RESEARCH FINDINGS

With the exception of a few who were recruited from a third country, most of the participants were employed directly from their country of origin before being brought to the UK. While the majority was legally recruited under the ODWs visa (old and new), others arrived in the UK on a visiting visa and/or without any or proper entry visas; thereby raising issue of trafficking for domestic servitude. Although none of the participants mentioned that they have been trafficked into the UK, it became apparent from the interview that five of the participants have applied for humanitarian protection in the UK as victims of trafficking for domestic servitude.



With the exception of three of the participants who had been admitted to the UK on the old visa regime, all the participants singled out the current ODWs visas as a major obstacle to their progress. In their opinion, the fact that the ODWs (especially those who were brought in illegally or not in accordance with the ODWs visa) were unable to apply for ODWs visa or regularisation left those with expired ODWs visa no other choice than to apply for humanitarian protection in order to stay in the UK. Although this research did not intend to test the genuineness of the claim to humanitarian protection by the participants, the suggestion by them that they needed humanitarian protection to counter the strict impact of the current ODWs visa queries the validity of their claims. However, the participants who were awaiting Home Office decision on their claim to humanitarian protection talked about their 'nightmares' and the 'trouble' they are going through to find a way to survive whilst their lawyers fight their case for them. When asked about the choice of returning to their homeland, the participants bluntly rejected the idea. Their defence was that much is at stake for them if they are forced to return to their homeland; poor socio economic background being a key issue. It became apparent that in addition to their very poor economic background, the lack of opportunity in their homeland, lack of job prospect, and lack of support from other source, as well as debt on money borrowed to facilitate their journey to the UK are other key issues. While the participants mentioned the lack of respect and ill-treatment by the employers as part of the problems they face as workers, they concluded that these problems could be remedied if they are able to obtain legal status and change employers in the UK. Notably, the participants who were admitted under the current ODWs visas claimed they were not aware of the strict conditions associated with the visas. On further questioning, they admitted that they would not have been discouraged from coming to the UK even if they have been properly informed about the strict conditions.

According to them, being an illegal in the UK with some job prospect is better than going back home to impoverishment. With the exception of those recruited outside their country of origin who claimed to have been briefed by friends about the opportunity to assert a claim to human rights in the UK, and the possibility of domestic workers gaining indefinite leave to remain after a period of time in the UK, the majority of the participants stated that they never thought about their employment rights or human right before arriving in the UK. They simply assumed that since the UK is a very rich and civilised nation, everything must be fine. All the participants who came to UK under the ODWs visas stated the employers did not give them a copy of the employment contract for keep, and that in any event the contract submitted to the British High Commissioner before their ODWs visas were issued was merely to represent an idea contract that the British High Commissioner wanted to see. With the exception of one participant who stated that her work was in accordance with what she agreed with her employer, all the participants claimed their employers lied to them as to the nature of their employment.

With regards to wages, none of the participant used the word “national minimum wage”, but the entire participants complained about not been paid decently, in time, or as agreed. Even, the domestic worker who stated that her workload was as agreed with the employer also stated that she was only paid the agreed salary in the first three months of the employment and that she never received full salary thereafter. It was clear from this investigation that the participants received payment according to the generosity of their employers. The average salary received by the participants was £400.00 per month as live-in worker on full time job; a salary that was well below the minimum wage for someone working in excess of eight hours.<sup>4</sup>

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<sup>4</sup> Adult minimum wage in 2014 was £6.50 See <https://www.gov.uk/national-minimum-wage-rates> last accessed August 4, 2015

While a few of the participants stated that they were given birthday present by their employers, the majority received no incentive or gift from their employers. All the participants related that they never had meal or socialise with their employers. Although a few of the participants mentioned, for personal reasons, the type of meal they eat was different from their employers, the vast majority recalled that their employer forbid them from eating the same food as them. A participant from Nigeria explained that she called her employer aunty as a sign of respect, but not as an indication of family relationship. Whilst few of the participants recalled been scalded by their employer for misplacing items, most of the participants recalled that their employers have shouted at them using abusive and demeaning words.

Other issues that were mentioned included the employers' insensitivity to the biological needs of their female employees. This included situations where the employers have failed to pay due salary and have not provided the employees with alternative means of meeting their sanitary needs.

None of the participants recalled being paid whilst off sick. Most of the participants mentioned that their employers would accuse them of being lazy if they reported feeling unwell. One of the participants recalled how she fell from the stairs and broke her wrist at the employers' house. She stated that the employer who refused to take her to hospital also told her that hospital staff would alert the Police to arrest her as an illegal immigrant. However, when the pain became unbearable, the employer allowed her to go to the hospital on the promise that she would register false detail, including fake address at the hospital.

## 5.7 THEMATIC ANALYSIS OF THE EMPIRICAL REASERCH

### 5.7.1 TRAFFICKING FOR DOMESTIC SERVITUDE

Anyone who is not a British or an EU national, but seeking to work in the UK households would normally require the ODWs visa to do so. To qualify for the visa, the applicant must have worked for the employer for a period of not less than 1 year preceeding the date of the application.<sup>5</sup> This position was reiterated by the legal informants.

*They [UKBA] expect you not to recruit someone specifically to bring them to the UK. They expect that person to have been employed by you or your family previously. That's why so many of the workers must have posed with photographs with family, friend, and family occasions so that they can get the visa in the first place (JN, Solicitor/Judge).*

Entry clearance requirement allows people to be screened by immigration officials before the visa is issued to them. However, there are those who will do everything legal or non-legal to convince the entry clearance officer that the visa requirements have been met. There are also those who would rather circumvent the visa requirement and use any clandestine method to arrive in the UK.

*More people who know they can't bring an individual into the UK lawfully because of the strict requirement would attempt bringing them in unlawfully (JDB, Employment Law Solicitor).*

At one of the interviews with domestic workers, R.O (not real name) recalled how a British expatriate recruited and trafficked her from the Phillipines to Singapore before being moved to the UK. She added that the expatriate used monetary power and connections to bypass the Philippines immigration. Further, the expatriate used her connection/position to easily convince the UK entry clearance officer to issue an ODWs visa to her.

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<sup>5</sup> Home Office – [Domestic Workers in Private Households](#). See also paragraph 159 of the Immigration Rules.

*So eh... I was offloaded in the Philippines immigration [detected and refused permission to travel] and so they [the British expatriate] made a way just to get me again. So they paid an escort in the Philippines. When I arrive in Singapore **they made me... the let me pay the ticket, air ticket, that am... 3 ticket actually and also the escort. The escort fee and also the Singapore agency fee.** So I didn't receive salary for 6 months working in the family. And I am overloaded with work. I work from 5.30 to 11.00 (R.O, 21-25years, Philippines)*

Although the initial clandestine movement from the Philippines to Singapore had nothing to do with the UK immigration services or the ODWs visa, the fact that the British employer who facilitated the trafficking subsequently moved her from Singapore to the UK is indicative that the employer continued to use non-legal methods to bring the worker to the UK. The movement of this worker to the UK fits squarely into the definition of trafficking as contained within Article 3 of the Palermo Protocol and as discussed in paragraph 3.5 of this thesis. The literature review showed that whilst some workers willingly (albeit as a result socioeconomic constraints) put themselves in the way of the traffickers, others are either coerced or compelled into trafficking (HRW, 2014, ILO, 2013). As the key elements of trafficking include coercion and deception, even though a recruiter has not physically forced someone to work as his/her domestic worker, if the worker has been deceived about the scope of her employment and her entitlement, that could amount to trafficking.

In *Taiwo v Olaigbe* ET/2389629/11, the domestic workers arrived in the UK from Nigeria on an ODWs visa, but it became apparent when the worker escaped the employer that she was lied to about the scope of her employment. It also became apparent that the entry clearance officer was lied to by the employer to secure the visa. In the case of participant R.O above, she was not paid any salary in Singapore because the employer decided to recoup all the money she had spent to move her clandestinely from the Philippines. Such action of the employer amounted to forced labour secondary to trafficking.

Although one may wonder why the worker did not escape the employer in Singapore or challenge the non-payment of wages, it is obvious from the literature review that the worker in such circumstance was in a very weak position and highly vulnerable (ILO, 2013). Further, the promise by the employer to bring the worker to the UK may have persuaded the worker to remain with the employer. In any event, given the desperation of some people from economically poor countries to travel abroad for what they considered greener pastures, it was not surprising that the participant from the Philippines fell prey to her trafficker.

*Of course I need a job, I needed a job very badly so I accepted and they use the escort. The immigration officer asks the document but I cannot give them because they [the employer] didn't provide me. I ask them to provide me these things, but they just email me. The Officer told me that he wants the authenticated one... the legal authenticated one, 'not the email from your friend' (R.O, 21-25years, Philippines).*

Providing further information on the method used by the employer to traffic her from the Philippines and the extent of her knowledge and participation, she recalled:

*Basically it won't happen if they use proper way. I don't really have the idea of the employment process, it was my first time to accept a job from outside the Philippines. I said [to the employer] what I know is that you have to go through the POAA process. That's the Philippines Overseas Employment Agency. It regulates all the Philippines who want to work abroad. And she said, oh no, I don't want to pay unnecessary charges to the Government, let's admit it, your Government is very corrupt. And besides, I need you urgently. And it will take a long time to get you if we register you in the POAA (R.O, 21-25years, Philippines).*

The empirical data showed that the majority of the non-British employers seemed to have familiarised themselves with the concept of trafficking for domestic servitude, whilst the majority of the British employers maintained that trafficking and forced labour is not an issue in the UK.

*I've not heard of trafficking into the UK. From which countries? And which bit of it is trafficking? I know that often people are forced into labour in Middle Eastern countries with Arab families and I think also there are some Chinese doing that (6109int33, 40yrs, Married, British).*

Those British employers who agreed that trafficking is a concern in the UK denied any personal knowledge of domestic servitude.

*Obviously trafficking in prostitution is much more covered on the TV, you read about it a lot in the papers and so on, but not really with domestic work (6109int32, 40yrs, British, Housewife).*

Perhaps surprisingly, in an attempt to justify that they treated their workers fairly, some of the British employers who admitted that they have participated in such activities which unknown to them could constitute trafficking for domestic servitude maintained that they did it in an attempt to assist the worker; otherwise as an humanitarian gesture. Describing how she brought her domestic worker to the UK from Hong Kong, one British employer stated that she provided the worker with documents that confirmed that she would continue her role with the family in the UK despite the fact that she no longer required the services of the worker, but was bringing her anyway to work for another member of her family.

*She came with us from Hong Kong. She's an Asian girl and in Hong Kong she was getting...ooh, my mind is terrible with numbers...she probably got about a thirty-per-cent pay-rise when she arrived here. But also, we had done a lot for her, you know, we had **got her the visa**, that was a big thing in itself. We had **found her somewhere to live with my sister-in-law**, doing a bit of babysitting for her in return for a very nice room, much nicer than the room she had in Hong Kong. So she's had that, and she's been here nearly a year.... (6109int33, 40yrs, Married, British).*

Similarly, another British employer who recruited her maid whilst in Hong Kong did not tell the maid that she would be working for her mother-in-law upon arrival in the UK. According to the employer, it would have made no difference had the worker been correctly informed because she was eager to come to the UK anyway:

*I just knew that my mother-in-law was going to need looking after and she wasn't going to get looked after by me! I made a resolution from day one that that was what was going to happen. ....I don't think I told her, but she wanted to come to England. But actually, she was very happy with my mother-in-law. She found her feet there; she really enjoyed it so it worked out well (6109int36, 58yrs, British).*

Even though it could not be said that the employers above brought their domestic workers to the UK to exploit them, the fact that they did not inform the domestic workers or the entry clearance officer of their true intentions means that they had in fact trafficked the domestic workers in the UK. The victims of trafficking have very limited rights at best to remedy in the UK. The legal informants related that migrants who have been trafficked for domestic servitude tend to have problems in bringing claims against their traffickers due to the doctrine of illegality that prevents UK courts from allowing cases that are tainted with illegal act(s) to be heard (Chitty, 2012; Emir, 2014, Poole, 2014). In the (possible) event that the court found that the domestic workers who have been trafficked to the UK have worked illegally, the victim would be barred from claiming against the trafficker; however unjust that could sound. Although if identified, the State can bring a criminal prosecution against the traffickers, the informants cautioned that bringing a criminal prosecution against the trafficker is not the same as compensating the victim.

*I think none of us have any doubt that criminal prosecution of traffickers or even people who are trafficking these migrant domestic workers is clearly in line with the common good, but I think one has to be careful with what is in line with the common good and what is the individual's best interest (JN, Solicitor/Judge).*

The legal informants were very sceptical and appeared to distrust the Police and the CPS in their handling of trafficking for domestic servitude case. In *Taiwo v Olaigbe*,<sup>6</sup> the domestic worker had through the social services complained to the Police about her mistreatment and the retention of her passport by the employers, but after a limited investigation, the Police decided the employers had committed no crime. The laissez-faire of the Police to conduct a proper investigation and the negative actions by the employers prompted the domestic worker to lodge a post-employment victimisation complaint, which was upheld by the court.

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<sup>6</sup> ET/2389629/11



Further, the informants viewed that it is not uncommon that the CPS would request that the victim of trafficking desist from making asylum application to the Home Office or from bringing a tribunal claim for compensation against the trafficker. This is because the CPS often argue that such an application could affect the criminal prosecution of the trafficker. The accused may argue that the victim was making up the trafficking story so that he/she could gain a residence permit, and/or to make money in the UK.

*The Police and the CPS often say we need our witness for the prosecution to be untainted by any suggestion that they have any financial gain from successful prosecution. If therefore we are bringing Employment Tribunal Claims or any other formal civil claim of whatsoever, or indeed an immigration claim, or an asylum claim, these will suggest to the jury that this person has a potential other motives for making these allegations and therefore they do not want them bringing an asylum claim, they do not want them bringing any form of compensation claim whatsoever because they feel like this will snatch the purity of their witness (JDB, Employment Law Solicitor).*

The informants volunteered that since most of the victims of trafficking for domestic servitude are unable to bring any or successful compensation claim against the trafficker, they often resort to the Criminal Injuries Compensation Authority, a Government organisation that was created to compensate the blameless victims of violent crime, and trafficking for compensation. They argued that the law should be changed to allow the victims to pursue their traffickers directly for compensation. If the traffickers were charged, convicted, and jailed that would be great because the victim would probably feel a lot safer. However, the informants were of the opinion that the chances of getting any kind of compensation for which the domestic workers (victims) might use to rebuild their lives is not very good because even though the judge in a criminal proceeding has a discretion to make compensation order, such discretion is rarely exercised. Even when exercised, the compensation is usually nominal and very small compared to what a civil court would have awarded.

*The trafficking convention says someone who is classified as a victim of trafficking is entitled to compensation. So really where should that compensation come from? If they, the employers, disappeared, or they (the domestic workers) are too frightened to go to the police or bring a civil claim of some kind, where should that compensation come from? (JDB, Employment Law Solicitor).*

The legal informants viewed that under the Home Office anti-trafficking policy, a victim of trafficking can apply for a residence permit, which is for a year only, but may be renewed. However, such visas (temporary permits) are generally granted only if the victim is helping the police to conduct an inquiry. The granting of this temporary residence permit is not the same as granting asylum or humanitarian protection. It would only allow the victim to be in the UK for as long as the case against the trafficker lasts. To obtain a further leave to remain, the victim would have to make an asylum application or be referred to the NRM, which the Government set up to identify and deal with victims of trafficking.<sup>7</sup> The informants distinguished between the two authorities dealing with identifying the victims of trafficking.

*If there are no immigration issues, you send them to the UKHTC which is the UK Human Trafficking Centre. You get a much more reasonable decision from them. A much more reasonable, pragmatic, sensible decision from them, but there is so few cases obviously of trafficking that does not involve people with immigration issues. ... The UKBA responsible for immigration policy has been made in those cases [involving non EU victims] the competent authority to judge whether these people has been trafficked or not. And **that is just completely a flaw in the system because the same people who want to keep people out, exercising immigration control, deciding whether these people are victims of trafficking and shouldn't be removed. So what else are they going to come up with?** (CC, Immigration Solicitor).*

From the informants' view, given the attitude of the those who have been trafficked for domestic servitude, they are very likely to be suspicious of the Authority and very fearful of approaching the Home Office for fear of being detained and deported. They blame the imperfect incorporation of the anti-human trafficking convention of the council of Europe into the UK law.

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<sup>7</sup> See Home Office, Victims of human trafficking – competent authority guidance – version 1.0EXT, Valid from 24 October 2013. Available online [https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/298421/traffickingcompetent.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/298421/traffickingcompetent.pdf) Last accessed August 14, 2015

Those who have been brought as children to the UK for domestic servitude may often not have the opportunity to escape their traffickers until they probably have grown up. At this stage, they are probably even more afraid of the Authority and would prefer to live under the radar. Getting this type of people referred to the NRM is thus problematic for several reasons, amongst which is that the referral would mean that someone who has been managing to live under the radar for probably years would now be announced to the Authority who may decide to remove him/her.

*For a very vulnerable person who has remained under the radar up till now, you are actually saying ok we are going to flag your presence.... Unlawful presence to the UKBA. So you got to be sure... All it gives you is the right to stay for 45 days whilst you reflect on what your next steps are. So you had better be clear in your mind what the next steps are going to be before you actually, .....**Why would you want to refer client as a victim of trafficking to the UKBA, what does that give them if anything? Well, actually, all it gives them is a 45 days reflection period before they are removed** (CC, Immigration Solicitor).*

Similarly, in the experience of the non-legal informant, allowing potential victims of trafficking a 45-day reprieve before being deported from the UK is a badly conceived idea. Relating his experience with some Chinese potential victims of trafficking for labour exploitation, the non-legal informant recalled that once the victims who were housed in a safe accommodation became aware that they are likely to be deported to China after 45 days reprieve, they all ran away from the house and disappeared into the thin air.

*Because they knew if they stay there [safe house], the next thing they would be sent home. Also [the victims may be thinking] whilst we are here, we are not earning. **If we are not earning, we got debt to pay, we got families, and then they go and find a job. It's very much instrumental** (NC, Researcher/Union Activist).*

Apart from the fear of exposing victims of trafficking to the Home Office by referring them to the NRM, the referral procedure is not straightforward. Solicitors are unable to refer clients

to the NRM system directly.<sup>8</sup> The informants were of the opinion that Solicitors should be able to do so. They argued that recognising Solicitors as agents for the purpose of the NRM would make the referral process faster and straightforward.

*I have a client who has been supported by Social Services because she has a child. She herself has not been supported, but the child is being supported under the Children Act. Trying to persuade Social Services to refer her as a victim of trafficking is just an absolute nightmare because they haven't got a clue (CC, Immigration Solicitor).*

Furthermore the entire informants argued that getting the UKBA to recognise a victim of trafficking is not as difficult as getting the body to give the victim a residence permit to remain in the UK. They strongly criticised the UKBA as 'notoriously' inefficient and unfit for purpose. Recounting his experience working with the victims of trafficking for domestic servitude, one informant recalled that victims of trafficking could have a series of issues so severe as to result in the victim needing more time to narrate a story that is consistent and coherent. The legal informants recalled a typical Home Office decision denying potential victims of trafficking the right to remain in the UK:

*We often get this horrible decision where the Home Office says, historically she is a victim of trafficking... she is a historic victim of trafficking, but she does not need any... you know she is got away from her.... She is not endangered anymore, she does not need any protection anymore because she got away from people that captured her ages ago. ... Yes, she is a victim of historic trafficking. She is now actually planning to turn the whole thing round and get back at her traffickers through the employment tribunal; you know she is trying to do something about it. She is fighting back. But she needs a residence permit in order to do that and if she is a historic victim of trafficking, she doesn't get a residence permit (CC, Immigration Solicitor).*

Asked to the informants what their overall assessment of the NRM was. They stated that the direct involvement of the UKBA in making trafficking decisions is a flaw because the UKBA is predominantly anti low-skilled immigration.

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<sup>8</sup> [http://www.airecentre.org/data/files/Comic\\_Relief\\_Materials/Bristol\\_Page/Presentations/Section\\_5.pdf](http://www.airecentre.org/data/files/Comic_Relief_Materials/Bristol_Page/Presentations/Section_5.pdf). Last assessed August 10, 2015

The informants believed that the NRM should not be the only choice that is available to potential victims of trafficking. In their view, the domestic worker visa are another option that could be explored.

*[The] National Referral Mechanism for the victims of trafficking, the problem with that is, it is very costly for taxpayers and it doesn't work necessary. The most effective thing is the migrant domestic worker visa (VM, Caseworker)*

In addition, emerging from the empirical research is the issue of discrimination against women migrant domestic workers. The informants are of the opinion that the NRM does not often, if at all, take the vulnerability of women domestic workers into consideration whilst considering the effect of trafficking on them. Further, the informants criticise the UK Government ideology that removing the victims of trafficking from the UK to their own country would make them safer because they are being removed from bondage/slavery and are being returned to their family. Such an idea, they claimed, is far from the reality.

*Slavery of women is very emotionally constructed. And it's quite convenient to do it that way because then you can say we are protecting them by taking them by sending them back to their family, which is totally divorced from the reality of these peoples' lives. Oh, we are sending them back to their family, you could all starve together now, and it's not good news. ... Obviously, if you are in a situation where you have been beaten daily, sexually assaulted and so on, you are able to escape, somewhere for you safe, you tend to stay. You at least get fed. That is a good thing, don't get me wrong, but it is conditional. Effectively, and mostly the end point of that is after a period of 6 months you end up being deported to your country of origin (NC, Researcher/Union Activist).*

The staunchest criticism of the current ODWs visa was made by the informants who were of the opinion that the right to change employer would have provided the worker with the best security against mistreatment. It would have also encouraged mistreated or trafficked worked to escape the trafficker.

### 5.7.2 MARKET FOR DOMESTIC WORKERS IN THE UK

Contrary to the assertion by the UK Government (which the literature does not support) that there is no real need for non EU migrants to work as domestic workers in the UK (UKBA, 20012), the majority of the employers (including employers who are of Spanish and Australian origin) stated that they could not find British workers to employ as a live-in domestic worker.

*I think it is the case that it's hard to find British or Caucasians who want that sort of work. My parents have tried employing them and it is very, very hard and they've had some disastrous ones because it's very old-fashioned... there just aren't people who want that type of work anymore. I mean there is still some demand for good quality, old-fashioned butlers and people, but nowadays girls aren't content to go to housekeeping college or domestic school. And I think that's a great shame because it's really quite skilled work for people with English, there's a lot of PA work available..... My ideal domestic worker would be a bright British girl. My mother had a brilliant girl, but she left and she's now doing outside catering somewhere. (6109int33, 40yrs, Married, British).*

Despite portraying the British in a good way, the majority of the British employers conceded that they would not have employed a British as live-in domestic workers even if one was available.

*Well an English girl might want to talk to you and that would be awful! I say that as a joke, but I really don't particularly want to talk to people. I want them to get on with the work and I'll spend ten minutes talking to them every day [giving instructions], but I don't want to stand there whilst they're doing the ironing, listening to what they've got to say. No thank you. Migrants I don't think do have that attitude. **You're foreign to them, that's what you have to remember. And they're probably a bit nervous of you because they need the money, they need the work, and they're not quite sure if they're doing it right** (6109int36, 58yrs, British).*

Another British employer who had never personally employed someone British as a domestic worker, but was looked after by a British nanny as a child was of the opinion that non-migrants, especially British workers are probably not suitable as live-in domestic workers.

*I've never actually employed an English DW, but my Mother has, so maybe I can go from that...and I don't think she was particularly well-dressed, or that professional, and **she wasn't very hardworking either!** [Laughs'] (6109int31, 45yrs, British)*

This research took the view that the employers should have been pressed to elaborate on the difference between live-in and live-out domestic workers. Further, the employers should have been asked whether they were willing to pay a British national who showed interest as a live-in worker according to the minimum age and with other employment benefits. No doubt a typical British domestic worker would want to be treated like any other workers in the labour market, and would expect to be entitled to all the benefits such as maternity leave, but this may not be acceptable to an average employer. Nonetheless, the majority of the employers agreed migrants are the best live-in domestic workers because they are willing to work, humble, and hardworking.

*I think **migrants probably are the only workers available for the job really**, on the whole. They [migrants] are prepared to **work flexible hours**. I think they are suited to domestic work, largely because they **haven't got any qualifications**, so it's the only thing they can do. They're certainly hardworking. I think **more hardworking than non-migrants** (6109int36, 58yrs, British).*

Further, of the different groups of migrants, the majority of the employers considered Filipinos as the best live-in workers because they are considered more caring, friendly, hardworking, and relatively obedient.

*Filipinos are very hard workers. She's very quiet, very sort of placid girl, she just seems to dissolve into the background, she seems to disappear. I think they are harder working, they're definitely professional and I think they do all take great care about the way they look, and ours is definitely enthusiastic (6109int31, 45yrs, British).*

At the interviews and the focus group discussions, the informants were asked whether they believed migrant domestic workers are more hardworking than the native workers. Whilst all of the informants believed migrants are probably more hardworking than the non-migrants

are, they reached that conclusion on a different ground. The legal informants' understanding of migrant domestic workers as hardworkers emanated from their experience that this group of workers often work long hours without a break or day off; otherwise performing hard work. Although the non-legal informant also believed migrant domestic workers are more likely to be hardworking, he cautioned that this was as far as the migrant had just arrived in the UK. He concluded that once the migrant workers have familiarised themselves with the system and have settled, they will no longer be hardworking. He further stated that the hardworking tendency of migrants is a ploy to settle down, make some money, retain employment, and establish necessary connections.

*I think there is a strong believe employers have in mind in that somewhere, somehow in the world, there is still the ideal worker who is **subservient and hardworking and enthusiastic**; and has **no interest apart from working**. And the migrant workers can fit that for a while because they are very... you know, **they have a project... want to earn some money**. But when the project is fulfilled, suddenly they **revert being human beings**....Because they are stuffy after being here for a while and start talking about right and everything. Yes, because they are now in **a different economic circumstances** (NC, Researcher/Union Activists).*

On a more critical note, migrants may be hardworking for various reasons; one of which is the fact that those with limited leave to remain may want to pacify their employers for fear of being sacked and being liable to deportation. Further, unlike the native workers who may have families close by, most of the ODWs are unlikely to have their families in the UK; and are therefore more likely to stay with the employer and be available to work at all times. In any event, those on the old ODWs visa still require the blessings of their employers to renew their visas, whilst those on the new visa may want to endure as much as possible so that they could earn enough to assist their family back home.

*They [migrants] have a greater incentive to work because **they desperately need the money**. You feel with an English person that they can move house and go away. They probably do work harder... because they want the work (6109int37yrs, Housewife, 53, Married, British).*



In addition to being submissive, prepared to work long hours, and being hardworking, other key themes that appeared in the employers' description of their foreign domestic workers include being respectful. In the view of the majority of the employers, the migrant workers' poor economic background and precarious immigration status means migrants are less likely to question the direction of their employers or argue their position.

*They [migrants] are more hardworking than non-migrants. ....Again, it might be more of a respect thing, maybe migrants have more respect than locals, and they respect you more because of the position they are in, whereas locals can take it for granted that they'll find work elsewhere, so naturally they're more cocky about things (6109int31, 45yrs, British).*

The perception of the non-legal informant appeared to be shared by one of the employers who employed a British live-out domestic worker because she could not find one to live in. She maintained that she could not trust migrants to work as a live-in worker.

*I think migrants have different agendas for working, I don't know because I've never... but not necessarily out of choice; it just didn't happen (6109int38, 40yrs, British).*

However, the above employer's perception of migrants is debatable because the British live-out domestic worker she referred to was actually an Israeli national who has naturalised to become a British national. Two of the theories that emerged from the employers' perspective are that (1) the market for migrant domestic worker in the UK is viable, and (2) due to their socio-economic background and immigration constraints, migrants domestic workers are more willing, to work hard, endure hardship, and be submissive to their employers.

### 5.7.3 SUBSTITUTING AU PAIRS FOR DOMESTIC WORKERS

One of the questions that was in focus in this thesis was whether the use of au pairs is a valid alternative to employing ODWs. According to the European Parliament's Committee on Women's Rights and Gender Equality (2011), au pairs are engaged in private households just

like the domestic workers. However, au pairs are different from domestic workers in terms of the nature of employment (Anderson, 2000) and immigration status. As opposed to live-in domestic workers who may receive accommodation and feeding as an incentive, au pairs who are mainly those on cultural exchange are normally provided with free accommodation and feeding as a guarantee/agreement by a host family in return for tailored child minding. However, au pairs are something used by employers as domestic workers (Newcombe, 2004). The European parliament (2001) has argued that some EU families might accept au pairs placement only to treat them as domestic workers and by so doing, cheating or circumventing the EU law. Accordingly, employers who wish for cheap labour, not minding that it is illegal to do so, may opt for au pairs instead of employing domestic workers.

*Au pairs are cheaper than the other options available because they're around all the time and for babysitting it's **expensive otherwise**. ...**They're cheaper than having someone for just 5 hours a day**. .... Because they're here for a year, which is a definite period (6109int37, Housewife, 53yrs, Married, British)*

In the above quote, the employer's reference to a year indicated her understanding of the maximum length of time au pairs may legally stay with their hosts. However, the correct position is that those who are eligible under the Tier 5 (Youth Mobility Scheme) that has replaced au pair visas, as well as EU passport holders may stay with their hosts in the UK for up to 2 years.<sup>9</sup> However, whereas EU passport holders have extra mobility freedom and are well protected under EU laws, au pairs from countries outside the EU who may start or end up with a precarious immigration status, have little or no protection and may be easily exploited and abused by the host. Data from this empirical research has shown the majority of the employers denied having employed au pairs. Although the majority of the employers are of the opinion that au pairs may be a substitute for domestic workers, they also conceded that au pairs are not as reliable as the domestic workers are.

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<sup>9</sup> See <https://www.gov.uk/tier-5-youth-mobility/overview> last accessed August 12, 2014

*I am very negative about au pairs for all the obvious reasons. They're often **very young**, very **inexperienced**, and I haven't got the time or the inclination to look after someone. .... I get the feeling that many au pairs come here to have a good time, they want to go out socializing, parties and so on. And I'm just not interested in looking after someone else. (6109int30, Unidentified Nationality, 2 children).*

#### 5.7.4 WHY EMPLOY DOMESTIC WORKERS

The empirical data showed people employ domestic workers for various reasons. All of the informants in this research agreed that there are situations where employing domestic worker(s) might be necessary such as, where the employer is physically unable to do his/her household chores him/herself.

*The only time you end up paying someone else to do your things is if you are incapable, or are that you think you are too important; the other things that you are doing are too important. There is an inbuilt kind of overseas employment relationship of superiority and inferiority in that relationship (NC, Researcher/Union Activist).*

Data from the interview with the employers of domestic workers have shown there are cultural, economical, and social context to employing domestic workers. Some employers considered their employment of domestic workers as a way to confirm their social standard, show off to neighbours and friends, or establish their worth in the society. This would be the case where the employer lived in an affluent society. More specifically, the need to maintain work-live balance was cited by majority of the employers as one of the reasons for employing domestic workers. Some of the employers described their employment of domestic workers as a strategy to keep themselves and their family happy. Even those employers who described themselves as housewives stated that they employ domestic workers for personal needs.

*It's not impossible to live without domestic help but I feel that if you can afford it, it helps me a great deal because with 3 children I needed someone. .... Allows me more time with my children (6109int37, Housewife, 53yrs, Married, British)*

In addition to ensuring house cleanliness and helping to create more quality time for the family, the assumption that having a domestic worker in the house would help to improve home security was shared by the majority of the employers. Meanwhile, some of the employers who considered domestic workers as people from poor economies, less performing countries, and desperately in need of a job and/or money; also considered their employment of domestic workers as a way of offering assistance to them. Conclusively, given the various reasons why people employ domestic workers, the market for domestic workers in the UK – legal or illegal – is more likely to grow.

#### 5.7.5 WHY EMPLOY MIGRANTS – MIGRANTS? WHO ARE MIGRANTS?

Article 2 of the International Convention on the Protection of the Rights of All Migrant Workers and Members of their Families defined migrant worker as ‘person who is to be engaged, is engaged or has been engaged in a remunerated activity in a State of which he or she is not a national’<sup>10</sup>. It was clear that the key element of ‘migrant’ in the definition is being ‘outside the country of origin’. Not surprisingly, the entire domestic workers and informants who participated in this research had no problem in understanding the word ‘migrant’ as someone who is not British. However, some of the employers expressed reservations on the true definition of migrant. The British employers sought to narrowly define migrants to exclude those who have been living in the UK for a long time; even though they are yet to be naturalised. To them, anyone who is domiciled and settled in the UK should no longer be regarded as a migrant:

*I’ve also had a Portuguese, I mean, do you count that? Because she’d lived here for so many years, so certainly culturally she was naturalised, but I don’t know what her status was....So you see she had more of the attitude that she wanted to share things with me. Migrants I don’t think do have that attitude (6109int36, 58yrs, British)*

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<sup>10</sup> United Nations, *Treaty Series*, vol. 2220, p. 3; Doc. A/RES/45/158

According to the employers, to determine if a person is a migrant, his/her tie to the community, including family relationship; must be taken into consideration.

*An Israeli lady who was married to a British person over here ...who had two children ....so **she's not really a migrant** because she was **domiciled** here ...so I don't know what that makes her, I mean, was she a migrant? (6109int38, 40yrs, British)*

One of the British employers who was married to a European citizen also found the word migrant to be very ambiguous.

*What's a migrant? I mean, my husband is European and my Mother is European, so how do you define a migrant. I think that's why I have less of a problem with foreigners because I'm used to it (6109int32, 40, British, Housewife).*

The above quote mirrored the definition of migrant by Sargeant and Tucker (2009: 1) as “someone who has migrated to another country to take up work and who currently does not have a permanent status in the receiving country”. Whilst a person who has obtained permanent residence or settled status in a country where he/she is not a citizen may be considered by some as a migrant, other people may see that person as a citizen, however controversial. Anderson and Blinder (2013) who has argued migrants may be defined as foreign-born, foreign-nationals, or people who have moved to the UK for a year or more concluded that the definition of migrant is extremely loose, and well politicised to justify the Government policy on immigration, race/ethnicity, and asylum. As such, the perception of migrant would depend on whom the question is asked to, and in what context the question of migrant arises. It follows that far from being settled, the definition of migrants is not straightforward because it involves many attributes. The negative side of this, is that the complexity in defining migrants could affect the way the issues relating to migrants are dealt with. The implication for the ODWs is that anyone who is perceived as a migrant stands the risk of being discriminated against by the law, the public and public institutions.

### 5.7.6 PICTURING THE LIVE-IN DOMESTIC WORKER

Whilst some workers are able to work as live-out domestic workers or part-time domestic workers, those on the ODWs visas are obliged by law to work as a live-in worker. The empirical data revealed that some of the British employers considered an English/British live-in domestic worker would be more suitable than the foreign workers because of their competency in English language and their familiarity with the British culture.

*It reassures me to have an English person working in the house in many ways, let's say, if I have to expect a delivery, if I have an immigrant, they wouldn't answer the door, because they don't speak English, and **I wouldn't allow them to anyway**. So it gives me a great security to have her [the part-time English domestic worker] here, she's very sensible and she is streetwise. If anyone knocks at the door, she is very good with them, and she's always willing to help in any way. ....  
**As a friend, she's also great**, I mean, if I have some paperwork, she always says 'Oh, don't worry, you have to go here and you have to say...' (6109int33, 40yrs, Married, British).*

By not allowing domestic workers whose English is not perfect to answer the door bell, the employer was isolating the worker socially. This aspect plays into the suggestion in literature that the ODWs often work behind closed doors (HRW, 2014). Symbolically, the above employer referred to her domestic worker as a friend. However, when it comes to the ODWs none of the employer ever saw their ODWs as a friend.

### 5.7.7 LACK OF RESPECT AND THE ILL-TREATMENT OF DOMESTIC WORKERS

It is well documented that domestic workers lack respect and are often not well treated by their employers (ILO, 2013; Kalayaan, 2014; UN, 2004; Wijers and Lin, 1997). Some of the participants in the empirical research expressed the feeling of being disrespected by the employers. In particular, the majority of the live-in domestic workers felt that their employers were not respecting them. This disrespect in terms of deliberate ill treatment such as shouting, scolding at them, and swearing.

*She always shouts at me. I don't know what the problem. I do this she said wrong. Whenever she tell me do thing I do it of course; but after that I am doing it she said why do this? I said you tell me to do this, after that she blames me. Yes I did told you to do this thing but this is wrong. Telling me this is not your house. You not allowed whatever you do this my house, this is not up to you, this is up to me (WM, 36-40years, Indonesia).*

In addition to the physical abuse, some of the domestic workers mentioned exploitation by the employers. One of them recalled when her employer suggested additional work loads she should do. The employer wanted her mother's house that is in opposite street to be cleaned by the worker without additional pay. When she refused, the employer became angry, unfriendly and treated her harshly.

*She became mad with me. Then she treats me bad. Like her husband was always shouting at me. ....We [domestic workers] should be respected. We should be treated like a human being. Like. .. Other workers. We are doing hard work, we are just asking for full respect not ... Because with no respect, it's just slavery (Sa, 36-40years, Moroccan).*

Meanwhile, contrary to the Home Office advise sheet that employers must not withhold the passport of their domestic workers,<sup>11</sup> the review of the literature showed that some employers did not trust their maids to keep their own passport for fear that they may abscond (Kalayaan, 2014; HRW, 2014). Although a few of the domestic workers who participated in the empirical research stated that their employers allow them to keep their passport, the majority of them stated that the employers withheld their passport.

*My passport not give. I never see my passport Sri Lanka come. Even London come I no see my passport. Madam keep passport. Never give my passport my hand. Only I write in my diary when passport finish. What can do. Even visa renew, passport no see (W.A.R, 36-40yrs, Sri Lankan).*

It is possible that employers often keep their domestic workers's passport so that they have ultimate power and control over them. One of the domestic workers recalled that soon after

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<sup>11</sup> Home Office - Overseas domestic worker information sheet - [UK Border Agency](#)

the employer recruited and brought her from Saudi Arabia to the UK, she was maltreated to the extent that she demanded to be returned to Saudi Arabia, but the employer who kept her passport refused to let her go.

*Madam [in an attempt to calm her down would say] sorry, you are my sister, I bring here. I give you food. I send you back Saudi Arabia after 2 years. I tell ok don't worry. I need my family go [wanted to visit her family]. Wait, wait, all the time liar. Even family [the employer family] come 3 o'clock I work, even they not happy. Like that I do even they not happy, what can do? I don't know this London, where go left, right. I don't anything. But one day I am run away (S.A.S, Over 40yrs, Indonesia)*

### 5.7.8 ALLEGATIONS – THEFT OF PROPERTIES

It is not uncommon for employers to accuse their ODWs of stealing from them (Oxfam and Kalayaan, 2008). Perhaps interestingly, the employers and the domestic workers in this research did not agree on the issue of theft of property. Whilst some employers mentioned that they have experienced theft by employees, some of the domestic workers reported that they had been wrongly accused of theft by their employers. For the employers, the theft of property and other forms of theft are amongst the negative side of employing live-in domestic workers, in particular. The fear that the worker might commit theft and the fear of leaving a female domestic worker home alone with 'the husband' was shared by a few of the employers.

*I think to me, it's that you're at risk, because for me, I'm leaving them here on their own all day.....there's some very bizarre ones – **you have to worry about the influence on your husband** (6109int32, 40yrs, British, Housewife)*

Relating her negative experience with a domestic worker, one of the employers recalled how terrified she was when intruders whom she believed were linked to her domestic worker, came into her house in an attempt to steal the keys to her brand new BMW. She claimed that she reported the matter to the Police, but was disappointed the Police did not make any attempt to investigate the matter.



*I had problems here [in the UK] with the people I used to employ. I had a girl who was from Lithuania and she was a very hard worker, very good worker, very quick and she would do the whole house every time and so I was very pleased with her, I couldn't complain, until I lost my whole trust. ...I was trusting her completely and she was really brilliant for a long time and it was all of a sudden something happened in the house and I thought 'Oh my goodness'. ... It was really bad because the police couldn't do anything because it wasn't even a break-in. It makes me really upset because of the girl because I love her, I felt very close to her and I was really disappointed (6109int40, 48yrs, Spanish)*

It appeared from the employer's description of the domestic worker that the worker could perhaps be an au pair working as a domestic worker. It could also be deduced from further remarks made by the employer that the worker was probably trafficked by the gang who controlled all of her movements and intended to use her as bait for further crime. Even though the employer said she felt for the worker because of the control the supposed gang had over her, she had to let her go because she could not trust her any longer. This matter added to the issue of trafficking and the dangers behind it. Nevertheless, the domestic workers offered a different perspective. They argued employers often make theft allegations where the worker has escaped and has threatened or start a civil claim against them. The domestic workers also volunteered that employers could make theft allegations to scare the worker or to justify withholding the worker's salary.

*I just work for one week, second, the third one, I was surprise with her saying to me that she lost a very expensive leader jacket. ....I am surprise with her calling me. Come, why, where the money that was here? £225.00 it was here (Sa, ODW, 36-40yrs, Moroccan).*

The above worker added that when the employer later found the money she was looking for, she did not apologise for making the theft allegation. Further, the worker stated that on another occasion when the employer made further theft allegation against her, she decided to end her employment and sought a new placement.

It is important to note that this worker had been granted indefinite leave to remain in the UK hence, she is allowed to change employer and even look for job outside the domestic workers industry. In a different complaint of theft allegation, another domestic worker lamented:

*Whenever she count money every day, where is my £10 gone where is my £20 gone. I explain, look, I work with you, I know my job very well. You no need to tell. I work with previous boss, there is £100 on the table and everywhere I didn't took it because this is not mine. And she was looking for £10, £20. [Said to the employer] Don't tell me that you thinking that I am gonna took it. And then she said no no no'' (DF. 36-40 years, Philippines).*

Another type of theft reported by the employers has to do with telecommunications. Some of the employers stated that their domestic used their landline to make unauthorised international calls leaving them with hefty bills. One of the employers stated that she had to dismiss a worker based on the misuse of the landline. The employers stated that they always advise their workers to obtain a mobile phone. Again, it was clear from the remarks made by the employer that the worker she had referred to was not an ODW but someone from the Eastern European countries who was probably an au pair. Damage to property was another issue that the employers raised. They reported that some domestic workers are careless to the extent that they could easily caused damage to fragile or priceless household items.

*We had one woman once, she was a bit older and I don't know what she was thinking, she was a good worker, but this one time, we weren't living here, we were living in rented accommodation, and anyway, she was doing the ironing when I was out, and she for some reason decided to iron onto the table! I've no idea why because she knew where the ironing board was, she'd used it before. So when I got home from work there was this awful mark on the table, and it was an expensive teak table (6109int32, 40yrs, British, Housewife).*

### 5.7.9 LOSS OF PRIVACY

According to the Labour Relations and Working Conditions Branch of the ILO, privacy issue is a concern for both the live-in domestic workers and their employer.<sup>12</sup> Further, reports by Kalayaan (2014) and HRW (2014) confirmed that the vast majority of the live-in domestic workers often do not have own bedroom or a secure bedroom. A review of the empirical data showed that all of the employers agreed that having a live-in domestic worker is a major concern when it comes to the their privacy and that of their family. Some of the employers relate that they do not feel free at home. For instance, they are unable to ‘walk naked’ at home (if they choose to) because they have to be mindful at all times of the presence of workers. Further, employing a live-in domestic worker is considered a risk because there is no way of vetting or properly vetting the worker. As such, the employment of a live-in domestic worker was considered a risk.

*The only thing I can think of, the main negative aspect is the potential loss of privacy. If you have a shower and you want to walk around naked you' can't. Even when you have live out it is an issue. This is one reason for hiring live out, but also you get happier people, because on the whole they've started and sustained their own social lives and networks. This is much more likely than, in my experience when you've got live-in (6109int41, 45yrs, Australian).*

## 5.8 ETHICAL CONSIDERATION

There are several reasons why it is important to adhere to ethical norms in research (Resnik, 2011). These include (1) the promotion of research aims, (2) to ensure participants’ safety, (3) to encourage collaboration where necessary, (4) to ensure accountability, and (5) to build support for research. The researcher who is competent in research ethics and law, is skilled in the techniques of asking sensitive questions as well as in dealing with the vulnerable people.

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<sup>12</sup> [http://www.ilo.org/wcmsp5/groups/public/---ed\\_protect/---protrav/---travail/documents/publication/wcms\\_230837.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_230837.pdf) last accessed August 10, 2015

A research is considered sensitive if it is private, stressful, and or the discussion tends to generate an emotional response (McCosker et al., 2001). The researcher understood that asking the ODWs to relate their lived experience could result in some of them remembering things that they would rather not remember. The researcher bore this in mind throughout the investigation and he was able to empathise with the ODWs participants were necessary. The researcher's familiarisation with the Data Protection Act 1998, ethical code in legal practice, and the guideline of the social research association was very helpful throughout the thesis. The researcher's legal background posed a challenge during the investigation because some of the participants ODWs asked him for legal advice on both generic and specific matters at some point during the research. The researcher considered this a potential ethical problem, but his familiarity with the solicitors' code of conduct, as well as the Bar code of conduct allowed him to deal with the ethical situation effectively and efficiently. The researcher advised those who sought legal opinion from him to see their lawyers, discuss the issue with their union representatives, or attend Kalayaan and/or the justice for domestic workers to talk with one of their legal advisers. Another challenge that confronted the researcher was his link to a law centre in London that deals with matters relating to ODWs. This link posed a question of bias that the researcher must deal with. Understanding the possibility of bias and dealing with it is very important at every stage of research (Shuttleworth, 2009). The researcher addressed the issue of possible bias by declaring his research interest and abiding by the law centre's data management policy and guidelines (Pannucci and Wilkins, 2010). Furthermore, to ensure credibility and prevent undue influence (Chisholm, 2012; Rees, 2011), the current clients of the law centre and the clients that have been assisted by the researcher in the past were not included in the investigation. The researcher ensured neither the law centre nor any other group was able to influence the research outcome. Ethical approval was obtained from the University's Research Ethics Committee (see Appendix).

The recruitment of participants and their participation in the research was completely voluntary. Potential participants were provided with participants' information sheets, which contained full legible information on the research. Considering that an award or the promise of financial benefit could induce participants, the researcher did not give the participants any financial award. At every stages of the research, the researcher re-checked with the participants that they are happy to continue participating. Further, the researcher reminded the participants of their right to withdraw from participation at any time. The participants gave consent for data recording, storage, analysis, and the use of the research findings in future academic publications. The interview and focus group tapes were carefully transcribed to remove any information or connotations that could identify any of the participants; whereby maintaining the participants' confidentiality (Crow, 2008; Kaiser, 2009).

## **5.9 REFLECTION**

Perhaps as a result of the adopted research method, the journey into this research was not entirely straightforward. At the initial stage of the empirical investigation, the researcher contacted Kalayaan, an organisation that he had become familiar with during his voluntary work at law centres in London. In his letter, the researcher introduced himself as a PhD candidate intending to conduct an investigation into the plights of domestic workers in the UK. But, Kalayaan gave the researcher a cold shoulder when in response, it stated that the researcher is welcomed to reference any of its publications and use the data stored on its archive (which is open to the public) but warned that he will not be allowed any direct or indirect access to any of its service users (domestic workers). The researcher thought Kalayaan should have given him the opportunity to discuss his research proposal and perhaps see where they could be of assistance before shutting the door at him.

However, rather than being discouraged, the researcher drew strength in the fact that negotiating access in ethnographic research is not straightforward or simple task (Bengry-Howell and Griffin, 2012). Research involves a rigorous task that may be affected by the researcher's feeling (Hubbard et al., 2001). Thus, acknowledging and dealing with personal feeling is very important (Johnson, 2009). The researcher considered the cold reception by Kalayaan as a challenge and began to make further contacts with relevant organisations and individuals. The researcher's attendance and participation at a series of seminars, conferences and symposiums introduced him to key authorities in the study of migration and migrant workers. The researcher was also introduced to the Justice for Domestic Workers, a union of domestic workers in London.

The researcher's quest also led him to Professor O'Connell who, with Professor Anderson had conducted an earlier study on domestic workers that involved survey and interview with employers of domestic workers. With useful direction from Professor O'Connell, the researcher retrieved that research data from the UK data Archive. Gaining Ethics Approval for this research was a very important step, especially where vulnerable people are involved (Cocks 2006). A formal ethical approval was obtained from the Middlesex University ethics panel (see Appendix). The research was conducted in a manner that fully complied with the ethical guidelines of the Social Research Council. Bearing the Data Protection Act (1998) in mind, all the research data were stored on a hard disc that was accessible only with a password (Di Gregorio, 2000; Welsh, 2002).

The researcher's field note was very useful at the data analysis stage as it contained an accurate description of the mood, manner and gestures made by the participants. According to Baxter, et al. (2002: 49), the use of a research diary provided a space for extended notes, and ongoing reflection and re-evaluation of the research approach, process, questions and aims, and issues arising.

The in-depth interviews offered the participants an opportunity to relate their stories, in a reflective mode (Flick 2002: 202-203; Mason 2006: 63). Thus, the participants' accounts constituted the 'insider view' (Blaikie 2000: 115) of the problems. The researcher noticed the domestic workers showed more interest in the research, which they thought would help their cause. The researcher who considered this as an ethical issue did not want to raise their hopes or give them any wrong impression, but reiterated although the finding of the research would be made public, there is no way of guaranteeing that it would bring about any changes to their negative experience.

## **5.10 CONCLUSION**

The huge and rich data that the empirical research has generated confirmed that the research method for this thesis was appropriate. The empirical research has assisted in shedding more light on the vulnerability of domestic workers and the precarity of their jobs, and more importantly, the lack of legal protection for them. The research indicated that the plight of the ODWs in the UK is shaped by various factors such as the workers' socioeconomic background, type of employer, as well as the law (immigration and employment, including health and safety and working time regulation). The views expressed by the majority of the informants were in agreement with issues raised by the workers. Notably, the lived experience of the workers varied not according to their nationality, but according to where they work (private or diplomatic household), the type of employers (whether scrupulous or unscrupulous), and their immigration status (whether settled, or on a temporary residence permit). The employers' diplomatic status, which could give rise to immunity from jurisdiction, made it difficult for the worker who escaped exploitation and abuse to seek justice in the court. This diplomatic immunity also created an undue balance of power between the employer and the domestic workers.

Although ODWs on the old visas could change employers and challenge their employers if treated badly, those on the current ODW visa were unable to change employer and unable to challenge the employer. They were also constrained by the employment law and had restricted access to justice. This empirical research shows in addition to socio-economic background, the despair in their native country deters these workers from returning home. Both the informants and the domestic workers agree that the domestic workers union does not only provide support to them, but it is a great avenue where most of them congregate, socialise, share experiences, get necessary education assistance (especially English skills and UK history), improve their awareness, and develop other skills.



## **CHAPTER SIX**

### **Discussion and Integrating Legal Literature Review and Doctrinal Investigation.**

#### **6.1. AIMS AND OBJECTIVE OF CHAPTER**

This chapter intends to take the integration of the literature review, legal research, and empirical research a step further with a view to identifying and harmonising the key themes that emerged from them.

#### **6.2. INTRODUCTION TO CHAPTER**

The process of merging both the empirical and the legal research allowed for the generation of concise theories (Van Gestel, 2011) that shed more light on the issues affecting the domestic workers in the UK. The legal research of this thesis was discussed in Chapter 3 and highlighted the fact that the current UK employment laws have drastically reduced the employment rights and entitlements of the ODWs; whilst the immigration law further complicated the vulnerability of the workers and made the residual employment rights difficult to enforce. The empirical research, which was presented in Chapter 5, also confirmed the legal research findings in Chapter 3 and showed that employers are more inclined to consider foreign domestic workers as desperate workers who would settle for any bargain. Perhaps more detrimentally, some of the employers of the domestic workers are not aware that workers no enforceable rights at all. In addition, those employers who seemed to understand that their domestic workers have limited rights often refused to acknowledge those rights as they preyed on the workers' poor social economic background that makes them more vulnerable in the labour market.

The lack of or inadequate legal protection (Albin and Mantouvalou, 2012) for domestic workers has restricted their access to justice (Salih, 2013) and has worsened the power imbalance (Bewley and Forth, 2010) between household employers and their workers. The ODWs admitted to the UK since 6<sup>th</sup> April 2012 now have to rely extensively on their employers who they cannot change; making them more vulnerable to exploitation and abuse. The review of literature showed the negative lived experience of the ODWs goes beyond their workplace exploitation (Adamson 2008) to include issues of domestic servitude, modern day slavery, abuse and discrimination (HRW, 2014; ILO, 2013).

Furthermore, the lived experience of the ODWs as evidenced in the empirical data shed more light on the link between the ODWs vulnerability and trafficking for domestic servitude. It has also highlighted the need for a review of the law on illegality, which has been preventing mainly illegal domestic workers from claiming against their employers. More importantly, the continued refusal of the UK Government to implement the ILO 2011 international framework for domestic workers protection remains a major barrier to improving the image and experience of domestic workers in the UK.

### **6.3. A VIEWPOINT OF DOMESTIC WORKERS LEGAL ISSUES**

The legal investigation into the plights of ODWs in the UK private and diplomatic households has shown that their legal issues are those that relate to immigration and employment law in particular, but access to justice in general. A review of the current Government immigration policy and law showed domestic workers are not in any way considered a priority despite their long-standing history of experiencing social injustice, abuse and exploitation. Immigration law plays a significant role in the plight of the ODWs because their immigration status often determines how legally protected they are.

The ODWs are not the only group of workers that are issued with visas that tie them to their employer. For instance, foreign-trained nurses from countries outside the EU (such as nurses from the Phillipines) are able to practise in the UK under the Tier 2 (General) visa that tie them to a specific hospital (the sponsor).<sup>1</sup> However, unlike the ODWs, those on the Tier 2 visa can renew the visa in the UK and they are allowed to change employers provided the new employer could re-sponsor them.

Another issue is the employment-related laws that partly exclude domestic workers from protection. Although the ERA 1996 provided employment protection for all workers including domestic workers, the lack of enforcement mechanisms has left domestic workers in private households at the mercy of their employers to the extent that they often experience (a) lack of, or inadequate employment contract (b) discrimination (c) wrongful dismissal, and (d) unfair dismissal at a greater rate than the other workers (CAB, 2012). Regulation 2(2) of the NMWR 1999 made it easier for employers not to pay their domestic workers according to the minimum wage. The problems associated with this include (a) unlawful deduction in wages (b) non-payment of wages (c) non-payment of tax and/or national insurance contributions. All of these put the domestic workers at a greater economic disadvantage.

The Working Time Regulations 1999 provided a loophole for employers who intend to exploit and/or abuse their workers. The exclusion of domestic workers from protection has exposed them to (a) onerous working condition (b) lack of or inadequate daily and/or weekly rest periods and (c) failure to give paid annual leave or cash in lieu. Further, s.51 of the HSWA 1984 that expressly excludes the ODWs from protection has increased their vulnerability to hazards.

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<sup>1</sup> Home Office (2015) Tier 2 Shortage Occupation List Government - approved version valid from 6 April 2015 [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/423800/shortage\\_occupation\\_list\\_april\\_2015.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/423800/shortage_occupation_list_april_2015.pdf) last accessed August 22, 2015

### 6.3.1 PROBLEMS ASSOCIATED WITH THE DOMESTIC WORKERS VISA

Since 6<sup>th</sup> April 2012, Article 3 of the Unfair Dismissal and Statement of Reasons for Dismissal (Variation of Qualifying Period) Order 2012 has increased the qualifying period for unfair dismissal to 2 years continuous service. Given that the current ODWs visas only entitled the bearer to a maximum of 6 months stay in the UK, the ODWs have been systematically disadvantaged if the employer dismissed them unfairly; except the claim relates to automatically unfair dismissal (Sargeant and Davies, 2012). The fact that the ODWs visa is not subject to renewal also means that the bearers may not be able to open a bank account.<sup>2</sup> This inability would further expose the worker to exploitation by the employer who would pay them money to hand. As such, the new visa has made the power imbalance (Bewley and Forth, 2010) between employer and workers even worse. According to the informants, the restrictions imposed on workers by the ODWs visa has made life more difficult for the new workers because they are too reliant on their employers.

*But what the situation will be now with the new arrangement is dread to think because they are totally dependent on the employer. I think they are going to come with visitor visa for a while... then they will be completely go under the radar (NC, Researcher/Activists).*

All the informants expressed deep concern about the damage that the new visa regime has caused the domestic workers. To them, the new ODWs visa set back the achievement that was previously earned by domestic workers in the UK. This achievement includes the granting of visa concessions for them between 1998 and 2002, and the introduction of favourable ODWs visas between 2002 and 2012.

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<sup>2</sup> With the Immigration Act 2014 now in force, opening bank accounts in the UK has even been made more difficult for foreigners.

*Many employers are ignoring the law and therefore we fear that it is not going to have the slightest impact on many employers who are quite prepared to ignore the law. That is going to put those employers in a stronger position because they would take the person on for 6 months, the person would then possibly remain as illegal. If the individual then attempts to assert any right or attempt to flee, the employer would be able to say to them well we can have you arrested and deported. The employers are already saying this to people who are perfectly here legally. So it's going to put that individual into a bad position. Many of these people do not speak English. .... They know that the person could be sent home after six months and if they don't pay them the national minimum wage, there is nothing they can do about it (JN, Solicitor/Judge).*

### 6.3.2 THE TRANSIT BETWEEN LEGAL AND UNDOCUMENTED WORKER

Another theory that emerged from the empirical research was that desperation to travel abroad to make a living (otherwise, socioeconomic problem) has made the ODWs more vulnerable to trafficking, exploitation, abuse, and forced labour. Although there are those domestic workers who are illegal ab initio because they do not possess any or the correct immigration papers that allowed them to enter the UK, those who entered the UK on the restricted ODWs visa are more likely to end up in an undocumented position at the expiration of their visa. The new ODWs visa has made it easier for unscrupulous employers who, realising that the workers have no right at all if they work illegally, to allow their domestic workers to remain working after the expiration of their visas. Perhaps this could partly explain why the majority of the employers mentioned that they are not prepared to report to the police if they suspect that a worker has been trafficked. The employers stated that reporting the victim to the Police might complicate matters for him/her.

*...I'd tell her to get out of the traffic jam, if possible! No, I probably wouldn't report it because then you're punishing the woman probably. First of all it's a lot of work, and secondly, you'd have to make sure that it was the right thing to do for everybody concerned (6109int36, 58yrs, British).*

It was not possible to explore why the employer believed reporting victims of trafficking to the Police would make things more difficult for them because the data relied upon was collected from them a few years back by other researchers.

Meanwhile, it became apparent from the empirical data that those on the current ODWs visa who had escaped their abusive or exploitive employers would probably go under the radar as they become aware that they had to return to their home country. The shift in position from a legal (with visa) to becoming undocumented worker, otherwise illegal (without visa) could make the experience of foreign domestic workers even worse (HRW, 2014; Kalayaan, 2014). Although the actual numbers of undocumented domestic workers in the UK are unknown, anyone whose status has changed from legal to illegal will only add to the number. Perhaps because undocumented workers often find a means of surviving under the radar,<sup>3</sup> most of them often do not bother about returning home. Some employers who recruit migrant domestic workers in the UK labour market (when in fact they are not legally allowed to do so) often do not check to confirm that the applicants have the right to work in the UK. Some of them believe that if the worker is in the UK, he/she must be legal.

*I think that would be very difficult to do. Mind you, this Brazilian girl, I'm paying her by cheque and that's the other thing when you pay cash, but the Brazilian girls I've always paid by cheque, which means they must be allowed [legal with visa] (6109int37, Housewife, 53yrs, Married, British).*

Even though all the employers condemned illegal immigration and referred to it as a factor that pre-disposes illegal workers to a vulnerable situation, their attitude towards employing illegal immigrants was diverse. Whilst the majority of the Spanish employers stated that they would not normally employ an illegal immigrant to work in their households, they also appeared to be more sympathetic to those, especially women, who had left their own country to look for work in another country so that they could feed their family, but had become undocumented. This position sends a mixed message:

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<sup>3</sup> Working Lives Research Institute (2007) *United Kingdom Country Report, Undocumented Worker Transitions*, EU Sixth Framework Programme, Contract Number: 044272/ Tessa Wright and Sonia McKay, July 2007 (Minor revision November 2008).

*One of the big problems today with migrants is that they don't have papers, they try to make a living, they have to run away from home, which is not very nice for them and they have to make a living and they do the job that just a normal woman wouldn't do it. On one hand you try to understand that people have to make a living and it's not maybe fair to employ them because they are not legal, but if you do not employ them then it's making the problem worse because then they got to do more naughty things. But even if you employ them, they will still sometimes get involved with other things because they need the money (6109int40, 48yrs, Spanish)*

By contrast, the majority of the British employers who were very sceptical about employing illegal immigrants often suspected domestic workers from the Eastern part of Europe (outside the EU) were mostly illegal immigrants, and would not normally employ them.

*I wouldn't go there with an undocumented worker because I just don't see the benefit. Even if you said 'Oh well, they're cheap' I think you'd be on false economy and I think that if people are prepared to do that then whatever they get they, not deserve, but both parties are taking the risk and let them get on with it as far as I'm concerned because to me they're both not being fair (6109int38, 40yrs, British).*

### 6.3.3 THE DIPLOMATIC HOUSEHOLDS WORKERS Vs DIPLOMATIC IMMUNITY

Under current Government policy, domestic workers in diplomatic households could change diplomatic employers, but they are unable to change to private employers (Gower, 2012). Although their visas could be renewed beyond 12 months, they would not be allowed to renew the visa beyond a 5-year period; even if it was still required by the employers.<sup>4</sup> Domestic workers in diplomatic households also suffer similar detriments as their counterparts in the private households (Oxfam and Kalayaan, 2008); however, the problems of those in the diplomatic households are complicated by the special status of their employers (Phelan and Gillespie, 2013). All the legal informants stressed that States and diplomatic immunity have made it difficult for the worker to achieve justice because if a dispute ensues between the worker and the diplomat, the diplomat is most likely going to plead diplomatic

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<sup>4</sup> This decision could be put into test with effect from 2017 (5 years post 2012) when the first group of domestic workers on diplomatic household visas, who remain legally in the UK, would have stayed for 5 years. This is because under the current immigration rule, any worker who has been in the UK for 5 years is entitled to apply for settlement status.

immunity. At the focus group discussion, the informants mentioned a particular case that was pleaded on behalf of a domestic worker against the employer, a foreign embassy in the UK.

*This person was employed directly by the Embassy. So, the embassy can certainly raise State immunity. And that's what they are attempting to do. So we went to the employment tribunal. We said yes, we could see that there was employment contract here, but the employment contract was with the Embassy and we believed that they are entitled to immunity. However, we can see there are arguments in relation to Human Rights Act [1998] and how we should construe employment contract, EU legislation, and the fact that someone is raising diplomatic immunity. So in fact what the judge has done was rather than simply saying look they are entitled to rely on immunity, the judge has said actually, this is an issue that needs to be considered further (JDB, Employment Law solicitor).*

Lately, there has been what appeared as conflicting signals from the Court of Appeal in relation to cases where immunity is an issue. In *Reyes and Suryadi v Al Malki and Al Malki* [2015] EWCA Civ 32, the court held that the Claimants who had been identified by the Home Office as victims of trafficking cannot pursue their claims against their Saudi Arabia diplomat employers because the doctrine of immunity trumps any rights that they have as victims of trafficking. However, in *Janah v Libya, Benkharbouche v Sudan* [2015] EWCA Civ 33, a combined case concerning two Moroccan nationals who were separately employed by the States of Libya and Sudan, exploited and abused by the employers the court made a rare declaration of incompatibility under the Human Rights Act 1998 to the effect that the State Immunity Act, which prevented the Claimants from pursuing their claims against the embassies, was set aside to allow their claims to progress. Given that both cases above were decided in the Court of Appeal, it is not clear why the court held that diplomats have inviolable immunity whilst the States/embassies do not. While the decision in *Janah v Libya* above may force (to avoid shaming) the embassy to settle the claims out of court, if the embassy choose to appeal or ignore the decision altogether, it is very much difficult to see how the Claimants would force the embassies to pay any award the court may award to them. As it stands, immunity in diplomatic households remains in a legal limbo.



#### 6.3.4 EXCLUSION FROM THE MINIMUM WAGE: A RECIPE FOR EXPLOITATION?

Within Regulation 2(2) of the National Minimum Wage Regulation 1999 SI No. 584, domestic workers could be excluded from the minimum wage if their employers could show that they were treated as a member of the family (Shilling, 2013). All that the employers had to show is that the worker is a live-in domestic worker, house rent is not charged to the worker, the worker has free access to food, and that they share tasks with the worker (HRW, 2014). This lacuna has created problems for domestic workers who wish to assert any right to the national minimum wage. The legal informants were of the opinion that the current objective test adopted by the court in interpreting whether a domestic worker has been treated as the employer' family member is wrong. They argued that a subjective test would have put the onus on the employer to justify that the worker has been treated as a family member.

*Regulation 2 (2) refers to sharing of task and activities... so they [the courts] took the view that it must be a very objective tick box. So, did they ever share any activity, did they ever have meal together, if the answers to that is yes, you got to answer that they are treated as a member of the family. We argued that actually it got to be a subjective test and you got to look at that person's place in the household. How are they treated in a round? ... I could remember some of the first cases that we did [as a Solicitor], often you will hear the employer saying: this worker used to call me aunty or refer to me as uncle so this is evidence of a close family relationship and treatment of her as a member of the family..... And a lot of times we have to explain that actually, in some cultures, it's just a polite way of addressing somebody. Certainly I can remember the very first cases, the rep [Solicitor] on the other side spent a long time addressing the Tribunal on the use of the word aunty as a family member. We said, that means nothing because she had a background where she knew about that particular culture group and she knew it was just a polite way of addressing somebody (JN, Solicitor/Judge).*

The conditions that must be satisfied under Regulation 2(2) before an employer could withhold paying the worker according to the minimum wage are that: (i) the worker resides in the home of the employer; (ii) the worker is not a member of that family, but is treated as such, in particular as regards to the provision of accommodation and meals and the sharing of

tasks and leisure activities; (iii) the worker is neither liable to any deduction, nor to make any payment to the employer, or any other person, in respect of the provision of the living accommodation or meals, and (iv) had the work been done by a member of the employer's family, it would not be treated as being performed under a worker's contract or as being work. Nonetheless, the Regulation does not clarify if the entire criteria must be satisfied for the minimum wage exclusion to apply. With respect to accommodation, the obligation that the employer should provide the domestic worker with accommodation is enshrined under the immigration rule 159A (ii). However, the government allowed employers to charge accommodation offset (rent, charges for gas, electricity, furniture, etc., and laundry inclusive) on the domestic worker's wage.<sup>5</sup> The payment of accommodation offset could mean that the accommodation provided by the employer is not entirely free. Notably, the Home Office did not specifically mention that domestic workers should be treated as a member of the employer family.<sup>6</sup> Although one of the requirements the Home Office has set for the ODWs visa applicants is that they must have been employed by their sponsor for a period not less than 12 months before their application, this in a way is to ensure that there is a genuine existing employer/employee relationship between them.<sup>7</sup> The legal informants were of the opinion that employers of domestic workers and the domestic workers often know each other one way or another.

*It may be that the whole of the worker's family has been working for the employer family for several generations. Or... there is usually some sort of link which is how they became aware of the worker in the first place. So workers whose family are living in close proximity or whose parent know the parent of the employer are particularly vulnerable (JDB, Employment Law Solicitor)*

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<sup>5</sup> See <https://www.gov.uk/national-minimum-wage-accommodation> last accessed August 12, 2015

<sup>6</sup> Home Office Guidance – Domestic workers in private households – v10.0EXT Valid from 28 March 2014 [https://www.gov.uk/Government/uploads/system/uploads/attachment\\_data/file/299022/ODW\\_v10.0EXT.pdf](https://www.gov.uk/Government/uploads/system/uploads/attachment_data/file/299022/ODW_v10.0EXT.pdf), last accessed August 15, 2015

<sup>7</sup> Home Office, UKBA – WRK2.1 Overseas domestic workers in private households, WRK2.1.2 Period of previous employment (2013).

Perhaps the staunchest of the problem with being treated as a family member is the ‘sharing of task and leisure activities’. Section 28 of the National Minimum Wage Act 1998 inserts a reverse burden of proof to the extent that the onus is on the employer to show that the domestic worker is treated as a member of the family (Cabrelli, 2014: 108). The relationship between the ODWs and their employers depends on various factors such as trust, which is crucial in creating employees' commitment (ECWO, 2011). If the employer fails to trust the worker, the relationship could break down very easily. This thesis empirical data shows that some families are more accommodating than others.

*We have the spare room up top which actually we use as the library, but she could have used that on Sundays, which she never did because she felt that it wasn't her own home so that was fortunate (6109int 36, 58yrs, British).*

In determining if a domestic worker has been treated as a member of the family of the employer, the ET often takes a holistic view of the relationship between the parties. In *Asuquo v Gbaja* (unreported)<sup>8</sup> the ET took into consideration, the integration of the worker into the family unit, the Respondents nature of control of the Claimant; the Claimant's lack of privacy, restriction on the Claimant to socialise with others, Respondents deceptions, and the exploitation and abuse of the Claimant by the respondent.

We consider next whether the Claimant was treated as a member of the Respondent's family (as the Respondent contends); or as a domestic servant (as the Claimant contends). We find that she was treated as a domestic servant, including for the following reasons: It is correct, as submitted by the Respondent's representative (and agreed by the Claimant) that she lived in the Respondent's family home, had accommodation provided for, food provided for and no deductions for those items. Some of the ingredients of living as a member of the family were, therefore, present. ...the Claimant was not allowed to leave the house without permission. An adult member of the family would have been able to do so. ...the Claimant was misled by the Respondent as to her immigration status. This would not occur with a member of the family'.<sup>9</sup>

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<sup>8</sup> ET 3200383/2008

<sup>9</sup> *Asuquo v Gbaja* (unreported) ET 3200383/2008 at para 78

In contradiction to the suggestion by the domestic workers that employers do not often provide them with any incentive, it emerged that very few of the employers have argued that they treated their workers as if they are a member of their family or equal.

*I think there was a slightly personal element, you just can't get away from it, but it wasn't anything meaningful. But you know, after they've been cleaning for a while, we'd always get them Christmas gifts and you'd always find out when peoples' birthdays were. They would generally call me Mrs...and I would call them by their Christian names (6109int32, 40yrs, British, Housewife).*

However, the informants were not convinced that a genuine relationship can exist between the employer and the worker because, as they could see it, their relationship is one that is enshrined in exploitation, albeit at a misconceived believe of mutual benefit.

*[Is like] the Royal family treating a worker as a member of the family. Is like a limited company saying it treats workers as a member of the family (VM, Case worker)*

Accordingly, it is not strange that most of the employers referred to their relationship with their domestic workers as professional.

*This is inevitable because they're in your home. They share and look for support in their problems, but not the other way round. I wouldn't share any problems with them, but they from time to time do share problems. But, but it is a quid pro quo because their loyalty and willingness to go the extra mile is assumed by that support (6109int41, 45, Australian).*

On the other hand, even though most of the employers signal that they would never socialise with their domestic worker, they do not consider that their relationship with the worker should be very strict.

*I wouldn't go for coffee with her but I would take her out, even if I don't need her to help me. So now that we are here, for example, she's at a bit of a loose end so I would say to her 'do you want to come with me?' If we're going to the park or something like that, even though I do not need her to be with me to help me with the children, I will say 'do you want to come?' and J (the husband) will say 'Let's bring her because she might like to see this or that'. But I would never socialise with her the way some people do. ....I don't think she would be comfortable with it, to be honest. I always say to her 'look, why don't you eat with us?' because she doesn't, she likes to eat on her own, after us or at a different time. That's what she's comfortable with (6109int34, 37yrs, Married, British, 2 children).*

Going by the above, one may want to argue that despite some employers not feeling comfortable socialising with their domestic workers, this may not necessarily mean that they do not want to treat the worker as a family member. By requesting that the domestic worker join the family in a meal, the employer has arguably demonstrated that the worker was treated as a family member rather than as an outcast. Nevertheless, the kind gesture demonstrated by the above employer appeared not to reflect the reality as the domestic workers have argued, and as contained in the literature (HRW, 2014; Kalayaan, 2014).

The EAT had an opportunity to interpret Reg. 2(2) in the combined appeal case of *Julio v Jose; Nambalat v Taher and another; Jose v Julio and other*.<sup>10</sup> Julio, Nambalat and Udin were three foreign domestic workers who were employed in similar circumstances in private households but have not been paid according to the minimum wage. Ms Julio, an Angolan national who was employed as a home help and nanny by Ms Jose, also from Angola, appealed against the determination by the ET,<sup>11</sup> which held that she was not entitled to the minimum wage because she was treated as a member of the employer's family. Similarly, Ms Nambalat, an Indian national who was employed as a live-in housekeeper and nanny by Mr Taher and Mrs Tayeb who were also of Indian origin, appealed the ET decision that she was not entitled to the minimum wage because she was provided with her own room, and shared meals and leisure activities with her employers.

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<sup>10</sup> [UKEAT/0553/10/DM; 2012] I.C.R. 487; [2012] I.R.L.R. 180; [2012] All ER (D) 100 (Jan)

<sup>11</sup> See *Julio v Jose* ET2222242/09 at para 10

In respect of Ms Udin, it was her employers Mr & Mrs Pasha who appealed against the ET finding that she was entitled to the minimum wage because she had not been provided with suitable accommodation at the latter part of her employment. Mr Justice Supperstone delivering the EAT panel's judgment examined the meaning of “sharing of tasks”:

The tasks that are for consideration are the tasks performed by the family as a family unit. Reg.2 (2) (a) (ii) requires the worker to be treated as a family member. The issue is whether the worker is integrated into the family. What work the worker does under his or her contract of employment is not relevant for the purposes of considering whether this condition is satisfied. There is no justification for importing the concept of equivalence into the clear words "the sharing of tasks." Regulation 2(2) (a) (ii) does not require the worker to share all meals, tasks and leisure activities with the family, but rather that the worker is treated as a member of the family in those particular respects. Each family is different. When considering whether the condition is satisfied the habits of the individual family in relation to the taking of meals, the sharing of tasks and leisure activities have to be examined.<sup>12</sup>

Although the judge agreed that exploiting a worker's position as a migrant worker to pay her less than the wages agreed and to do so over a substantial period runs counter to her having been treated as a member of the family, he rejected the claim that in this instance, the domestic workers were exploited. Applying a holistic test, the judge upheld the decision of the ET in the case of Ms Jose and Nambalat, and allowed the appeal by Ms Udin's employers. In effect, the court held that the three domestic workers were treated as a member of their employers' family and therefore not entitled to the minimum wage. Although with respect to Ms Nambalat, the EAT accepted that there was a privacy issue because the employers kept their printing machine in her room, they could concluded that the privacy issue was mitigated because the employers “would knock on the door if the Claimant was there or if the door was shut”, and accordingly her dignity and privacy were not disrespected.<sup>13</sup>

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<sup>12</sup> *Julio v Jose; Nambalat v Taher and another; Jose v Julio and other* [2012] IRLR 180 at para 44 – 46

<sup>13</sup> *Julio v Jose; Nambalat v Taher and another; Jose v Julio and other* [2012] IRLR 180 at para 51 – 53

Notably, in the case of Ms Udin the judge criticised the ET finding that the accommodation she was provided with at the latter part of her employment was inadequate. In the Judge's view, there is no separate test for accommodation under Reg. 2(2).<sup>14</sup> In orbiter, the judge made the following comment on Reg. 2(2):

The exemption in Reg.2 (2) should be narrowly interpreted; it must be shown that the relevant individual was genuinely being treated as a member of the family unit; in applying the test, the worker's place within the family must be considered holistically. There is no ambiguity in the wording of Reg.2 (2) (a) (ii). The wording emphasises that "particular regard" must be had to the provision of accommodation and meals and the sharing of tasks and leisure activities. However, it does not exclude regard to other material matters such as the general dignity with which a domestic worker is treated, the degree of privacy and autonomy they are afforded, and the extent to which, if at all, they are exploited.<sup>15</sup>

Both Ms Nambalat and Ms Udin appealed. At the Court of Appeal,<sup>16</sup> Pill LJ observed that the central issue in each case was “whether the appellants were treated as a member of family in particular as regards to the provision of accommodation and meals and the sharing of tasks and leisure activities”.<sup>17</sup> He explained that the word 'tasks' is a word commonly used to describe domestic duties in the 'family household', and that its use does not lead to the conclusion that the Regulation 2(2) can be concerned only with chores within the home, undertaken by family members, which fall outside the scope of the paid duties of the worker. While the judge agreed that how accommodation is allocated is likely to throw light on the general issue of treatment as a family member, he stated that the test that applies is whether, in the provision and allocation of accommodation, the worker was treated as a member of the family and not whether a particular standard of accommodation was provided. Rejecting the appeal, the court held that the domestic workers had shared task with their employers within the meaning of Regulation 2(2) and are therefore not entitled to the minimum wage.

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<sup>14</sup> *Julio v Jose; Nambalat v Taher and another; Jose v Julio and other* [2012] IRLR 180 at para 56

<sup>15</sup> *Julio v Jose; Nambalat v Taher and another; Jose v Julio and other* [2012] IRLR 180 at para 42 – 43

<sup>16</sup> *Nambalat v Taher & Ors* [2012] EWCA Civ. 1249 ; [2012] IRLR 1004

<sup>17</sup> *Nambalat v Taher & Ors* [2012] EWCA Civ. 1249 at para 9

Volunteering more guidance on the Reg. 2(2), Pill LJ explained that a broad equivalence of the work done in the house as between the worker and family members is not necessary, but a person receiving free accommodation and meals may be expected to perform more household duties for the family than other family members:

It is for the Employment Tribunal to assess, having regard in particular to the factors stated in (a)(ii), whether the worker is treated as a member of the family. The Tribunal must keep in mind *that it is for the employer to establish that the conditions in regulation 2(2) are satisfied* and that onerous duties may be inconsistent with treatment as a member of the family. Tribunals will need to be astute when assessing whether an exemption designed for the mutual benefit of employer and worker is, or is not, being used as a device for obtaining cheap domestic labour.<sup>18</sup>

The approved holistic approach in examining whether on the facts of the individual case, the exemption would apply means that one single fault alone (except it is substantial) may not be enough to hold that the exemption does not apply. The holistic approach also required a narrow interpretation in determining the workers place within the family. In summary, the holistic approach would require the Tribunal of fact to take note of the following points:

- 1) The onus is on the Respondent/Employer to show that a domestic worker has been treated as a member of family and that the exemption applies.
- 2) The Tribunal should examine whether the employer provides meals and accommodation.
- 3) The standard of the accommodation provided is irrelevant in so far as the same accommodation is shared by the employer and the employer family, if any.
- 4) When it comes to sharing of tasks, the relevant tasks are those outside the worker's contract of employment.
- 5) The equivalent value of the shared tasks is unimportant; suffice it that tasks are shared.
- 6) Regards should be made to how the worker has been incorporated into the family; in particular, whether leisure activities were shared; if the worker is treated with dignity; the degree of autonomy and privacy given to the worker; and the extent of abuse and exploitation, if any.

As it stands, whatever work a worker has been contracted to do, would not form part of the task to be considered for sharing with the employer. However, to sound a note of caution to unscrupulous employers, Pill LJ added:

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<sup>18</sup> *Nambalat v Taher & Ors* [2012] EWCA Civ. 1249 at para 48



Where it becomes obvious that the demands upon the worker are as onerous and extensive as to be inconsistent with the worker being treated as a member of the family, it cannot be argued that the condition under Reg. 2(2) is satisfied on the ground that such few tasks as are left outside the employment are shared between members of the family.<sup>19</sup>

Despite the Court of Appeal clarification, the case of *Akwiwu v Onu*<sup>20</sup> further showed that the issue surrounding Reg. 2(2) is far from settled. In this case, which centred on the treatment of a domestic worker, the Honourable Mr Justice Langstaff (President) sitting in a panel held Reg. 2(2) does not oblige the employer to treat his/her worker with *love and affection*. It is a question of whether and how the worker was integrated into the employer's family. No doubt, the Court of Appeal in *Nambalat v Taher* has given significant assistance on how to remove the loopholes in the family member exemption. However, aspects such as 'meal sharing' as featured in *Akwiwu v Onu* is one issue that both the EAT and the Court of Appeal in *Nambalat v Taher* has not fully address if at all.

By analogy, where the employer has failed to provide the domestic worker with any meal, the ET may draw inference from that failure; but where some forms of meal have been provided, the domestic worker may not be able to complain that the meal was inadequate. It is conceded that each family is different. Whilst some family feast together, other families may customarily eat separately. It is not clear how far factors such as religious belief, culture, and lifestyle may contribute to the treatment as a family member. Nevertheless, the exclusion clause as it stands makes it difficult for live-in domestic workers to complain that the accommodation their employers have provided them is not suitable. This could send a wrong signal to bad employers that it may be all right to provide their employees with an accommodation in contravention of the Housing Act 1985 ('Housing Act').<sup>21</sup>

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<sup>19</sup> *Nambalat v Taher & Ors* [2012] EWCA Civ. 1249 at para 47

<sup>20</sup> [2013] I.R.L.R. 523; [2013] Eq. L.R. 577; (2013) 157(19) S.J.L.B. 35

<sup>21</sup> 1985 c.68, London: OPSI

Understandably, the court does not want to set minimum criteria for accommodation for fear of the legal implication. However, because ODWs are required by law to reside with their employers,<sup>22</sup> the test for accommodation needs a more cautious examination. It could not have been the intention of parliament that employers could provide their ODWs with accommodation that does not comply with the provisions of the Housing Act. Under s.324 Housing Act, a house is overcrowded if the numbers of people dwelling in it contravene either s.325 or s.326. With respect to Ms Udin in the *Nambalat v Taher* case, her employers stated that their accommodation was downsized due to a financial constraint. Financial constraint does not appear to be a defence under s.327 (2) of the Housing Act. Although according to s.210 of the Housing Act 1996,<sup>23</sup> overcrowding does not necessarily renders an accommodation unsuitable; however, for treating someone as a member of the family as in Udin's case, there is nothing to suggest that her employers had her feelings in contemplation when they decided to downsize the accommodation. Further, the employers were not asked to justify why they continue to employ her despite their claim to financial constraints. The Workers' Housing Recommendation, 1961 (No. 115) provides that:

It should be recognised that it is generally not desirable that employers should provide housing for their workers directly, with the exception of cases in which circumstances necessitate that employers provide housing for their workers, as, for instance, when an undertaking is located at a long distance from normal centres of population, or where the nature of the employment requires that the worker should be available at short notice.<sup>24</sup>

The requirement that the domestic workers must live in the same accommodation as their employers is probably more beneficial to the employer than to the domestic worker because by keeping them in the house, they would be useful to the employer at short notice (Cox, 2006; Kandiyoti, 2013).

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<sup>22</sup> UKBA: *Entry Clearance Guidance, WRK2 - Work: entry for non - points-based system employment* <http://www.ukba.homeoffice.gov.uk/policyandlaw/guidance/ecg/wrk2/wrk2-1/> last accessed August 5, 2015

<sup>23</sup> 1996 c.52, London: OPSI

<sup>24</sup> ILO – *Workers' Housing Recommendation, 1961 (No. 115)*, Recommendation concerning Workers' Housing, 45th ILC session (28 Jun 1961), Geneva: ILO, paragraph 12(2)

Giving that the ET, the EAT and the Court of Appeal have all agreed the aspect of accommodation was failed by Ms Udin's employers, it is argued that the employers have failed to discharge their statutory burden under s. 28 NMWA 1998. It must therefore be right to argue that the employers should not have been allowed to avail themselves to the exception under the minimum wage. In addition, the law also expects the employer should provide the live in domestic worker with adequate meal. However, the empirical research showed the majority of the domestic workers complained of improper and or inadequate accommodation provided to them by the employers.

***It was very terrible because they let me sleep in the utility room.** The utility room is just a small room. ...And I sleep with the boiler, with all those pipes. With the electrical wires and washing machine, vacuum cleaner, cleaning tools, everything. Yeah it's a utility room. ....The reason was... she told me oh... I am very sorry; it's just for a week. I will let you sleep in the utility room because my employee from the office is staying with us for a week and she will use the other room (MF, Over 40, Philippines).*

At a different setting, another domestic workers volunteered the following description of the accommodation the employer provided to her.

*And the room is not a room just the box, with no window. It's just a small small small room with no heater no air condition... When it's cold, I couldn't even sleep. Then I go I buy a heater myself from Argos £50.00. When it's hot, it's the same. I couldn't sleep because no window no air condition. It's just a small and then they put the dish washing, dryer in the place where I am sleeping and the printer as well (W.A.R, 36-40 years, Sri Lankan).*

Some of the domestic workers stated that their employers starved them. Those who stated that the employers provided them with food added that the food was rationed and they had no choice or alternative.

*She will get angry if we buy expensive... not really expensive, but **she doesn't want us to eat chicken.** She said if you want to buy chicken, just buy chicken wings ok. You can buy **unlimited vegetable** but be **sensible with the price.** ...And sometimes **I don't eat at night** because I end my work **usually at 11 [23.00pm]**. When you are tired, you just want to sleep. You don't want to eat anymore (NM, 31-35years, Indonesian).*

Accordingly, one could theorise that the law and the legal system have probable got a wrong view of the problems faced by domestic workers in the private households. It seems in particular, that the EAT and the Court of Appeal decision in *Udin* concentrated too much on the credibility of Ms Udin whose evidence, the ET held implausible. However, it is not uncommon for employers to take advantage of their ODWs vulnerable position.<sup>25</sup> For instance, employers may take their ODWs on holiday even though all that the worker would do on holiday is to continue his/her routine – looking after the employer's business (such as childcare). A passage in the Court' judgement reads:

As for trips to Huddersfield, the respondent's evidence was that these were holidays; Ms Salim Udin travelled there as a member of the family, helping out by looking after the smaller children and contributing to other household tasks (at Paragraph 145 of the tribunal determination).<sup>26</sup>

Whereas employers may call this a holiday, it would be nothing close to holiday for the worker who is going on holiday only to continue caring for the family (Salih, 2013). The inability of the tribunal to see things from Ms Udin's point of view could have impacted on the tribunal determination. Mere invitation to holiday should not have been interpreted as treatment as a family member. The question that must be asked is '*what will the parties be doing on holiday*'? Is the domestic worker going to enjoy the holiday and participate in all the activities that the family has set for itself, or is the domestic worker going on holiday to continue her role as a worker? If the correct proposition is the former, then it could be taken that the domestic worker is being treated as a family member; however, if the latter is the correct preposition, it should be assumed the employer does not treat the domestic worker as a family member.

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<sup>25</sup> See M. Lalani, *Ending the abuse: Policies that work to protect migrant domestic workers (report)* Kalayaan, May 2011

<sup>26</sup> *Nambalat v. Taher and another; Udin v. Chamsi-Pasha and others* [2012] IRLR 1004 Per Pill LJ at 26

One of the arguments raised by Oldham QC in his submission on behalf of Ms Udin and Ms Nambalat was that the exclusion of domestic workers from the minimum wage under Reg.2 (2) is discriminatory against women.<sup>27</sup> According to Eurofound (2011), discrimination may be defined as different treatment of individuals or groups based on arbitrary ascriptive or acquired criteria such as sex, race, religion, age, socioeconomic background, and trade union membership and activities.<sup>28</sup> Sargeant & Lewis (2012) have also argued that discrimination as a prohibited conduct comes from the stereotype of women.<sup>29</sup>

The three main legal sources of equality and non-discrimination that is of particular significance in the development of concepts of equality and non-discrimination in the European legal context are the EC law; individual Member States law; and the international human rights law.<sup>30</sup> The United Nation Convention on the Elimination of All Forms of Discrimination against Women<sup>31</sup> obliges Member States to ensure their laws are based on the principle of equality of men and women. Further, under the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Their Families ('Migrant Workers Convention'),<sup>32</sup> which the UK has so far refused to ratify, signatory States are obliged not to discriminate against migrant workers in any form. Article 7 of the Migrant Workers Convention obliges ratifying States to respect and protect the human rights of all migrant workers and members of their families within their territory without distinction of any kind. Similarly, Article 11 (1) provides that no migrant worker or member of his/her family shall be held in slavery, servitude, and forced labour.

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<sup>27</sup> See *Julio v Jose; Nambalat v Taher; Jose v Julio* [2012] IRLR 180 at para 39 – 40

<sup>28</sup> EuroFound (2011) *Discrimination: the European industrial relations dictionary*.

<sup>29</sup> Sargeant, M & Lewis, D (2012) *Employment Law*, (6<sup>th</sup> Ed.), Essex: Pearson Education Ltd, pp. 144 – 160

<sup>30</sup> European Commission (2009), *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Network of Legal Experts in the Field of Gender Equality / Christopher McCrudden and Sacha Prechal, Directorate-General for Employment, Social Affairs and Equal Opportunities: European Commission

<sup>31</sup> United Nations, *Treaty Series*, vol. 1249, p. 13, Doc. A/RES/34/180

<sup>32</sup> United Nations, *Treaty Series*, vol. 2220, p. 3, Doc. A/RES/45/158.

Article 12 of the ILO Convention No. 143 concerning Migrations in Abusive Conditions and the Promotion of Equality of Opportunity and Treatment of Migrant Workers<sup>33</sup> provides that each signatory State shall, by methods appropriate to national conditions and practice, guarantee equality of treatment, with regard to working conditions, for all migrant workers who perform the same activity whatever might be the particular conditions of their employment. ILO Convention 189<sup>34</sup> consolidated the existing UN and ILO framework for domestic workers. In particular, Articles 6, 10, and 11 of the Convention 189 provide positive obligations on ratifying States to take measures towards ensuring equal treatment between domestic workers and workers generally, in particular in relation to minimum wage, working conditions, living conditions, and sex discrimination. Articles 2 and 3(2) EC Treaty<sup>35</sup> imposes the objective of promoting equality between men and women in the Community. The term discrimination first entered EU discourse in the form of its prohibition based on nationality in Article 18 of the Treaty on the Functioning of the European Union ('TFEU').<sup>36</sup> By virtue of Article 19 TFEU, Article 13(1) EC provides: “without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council....may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation”. Further, Article 119 (1) EEC, ex 141 EC now Article 157 (1) TFEU provides the right to equality between men and women in the context of pay.<sup>37</sup>

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<sup>33</sup> ILO: Migrant Workers (Supplementary Provisions) Convention, 1975 (No. 143)

<sup>34</sup> ILO: Domestic Workers Convention, 2011 (No. 189)

<sup>35</sup> The *Treaty Establishing the European Economic Community*, Rome, Mar. 25, 1957, 1973 *Gr. Brit. T.S. No. 1* (Cmd. 5179-II)

<sup>36</sup> European Commission (2009), *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Network of Legal Experts in the Field of Gender Equality / C. McCrudden and S. Prechal, Directorate-General for Employment, Social Affairs and Equal Opportunities: European Commission

<sup>37</sup> See European Commission (2009), *The Concepts of Equality and Non-Discrimination in Europe: A practical approach*, European Network of Legal Experts in the Field of Gender Equality / Christopher McCrudden and Sacha Prechal, Directorate-General for Employment, Social Affairs and Equal Opportunities: European Commission

This provision obliges Member States to ‘ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work’;<sup>38</sup> and prohibits any breach of the principle of equal pay whatever system gives rise to the inequality.<sup>39</sup> Accordingly, the principle of equality prohibits equal situations from being treated differently, and likewise, different situations from being treated equally.<sup>40</sup> Similarly, Council Directive 97/80/EC<sup>41</sup> provides that the principle of equal treatment means the absence of any discrimination based on sex, either directly or indirectly. Article 2(2) of the Council Directive 2000/43/EC<sup>42</sup> of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin states that, direct discrimination shall be taken to occur where one person is treated less favourably than another is; whilst indirect discrimination shall be taken to occur where an apparently neutral provision, criterion or practice would put persons of a racial or ethnic origin at a particular disadvantage compared with other persons, unless that provision is objectively justified by a legitimate aim and the means of achieving that aim are appropriate and necessary. The European Court of Justice, which by virtue of Article 19 TFEU is now referred to as the Court of Justice of the European Union (CJEU) has held that the principle of equality is one of the general principles of EC law.<sup>43</sup> The CJEU held in *Defrenne v SA Belge de Navigation Aérienne (SABENA)* that:

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<sup>38</sup> See *Brunnhofer v Bank der Österreichischen Postsparkasse AG* (C-381/99) [2001] All E.R. (EC) 693; [2001] E.C.R. I-4961; [2001] 3 C.M.L.R. 9 applying *Specialarbejderforbundet i Danmark v Dansk Industri* (C400/93) [1995] All E.R. (E.C.) 577

<sup>39</sup> See *Barber v Guardian Royal Exchange Assurance Group* (C-262/88) [1991] 1 Q.B. 344; [1991] 2 W.L.R. 72; [1990] 2 All E.R. 660; [1990] E.C.R. I-1889

<sup>40</sup> See *Koinopraxia Enoseon Georgikon Synetairismon Diacheiriseos Enchorion Proionton Syn PE v Commission of the European Communities* (C146/91) [1994] ECR I-4199.

<sup>41</sup> *Council Directive 97/80/EC* of 15 December 1997 on the burden of proof in cases of discrimination based on sex OJ L 14 of 20.01.1998 p. 6–8 applicable to the UK by virtue of the *Council Directive 98/52/EC* of 13 July 1998 on the extension of Directive 97/80/EC on the burden of proof in cases of discrimination based on sex to the United Kingdom of Great Britain and Northern Ireland OJ L 205, 22.7.1998, p. 66–66

<sup>42</sup> Official Journal L 180, 19/07/2000 P. 0022 - 0026

<sup>43</sup> *Albert Ruckdeschel & Co v Hauptzollamt Hamburg-St Annen* (117/76) [1977] E.C.R. 1753; [1979] 2 C.M.L.R. 445

“the principle of equal pay contained in Article 119 EEC (ex 141 EC now 157 TFEU) may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public (emphasis added)”.<sup>44</sup>

Although the CJEU drew a distinction between 'direct and overt' discrimination, which may be identified solely with the aid of criteria based on equal work and equal pay referred to in the EC Treaty 157 TFEU, and 'indirect and disguised' discrimination, which can only be identified by reference to more explicit implementing provisions of a community or national character in relation to which Article 157 TFEU is not of direct effect; subsequent case law of the CJEU have shown that that Article 157 TFEU is of direct effect where inequality of pay arises as a result of indirect discrimination in the form of disparate impact.<sup>45</sup>

### 6.3.5 NON-PAYMENT OF WAGES – WAGES THEFT

Domestic workers often experience unlawful deduction in wages or non-payment of wages (ILO, 2013; Kalayaan, 2014). Reviewing the empirical research data, two different theories were noticed. Firstly, for those who were recruited from a third country (such as Mid East, Singapore, Hong Kong), they related that even though the salary the employers paid to them in those countries was meagre (but nationally acceptable), they were paid on time. However, upon their arrival in the UK with the same employer, they are often not paid on time, and when they are paid, the payment is not according to the agreement. Secondly, for those who were recruited directly from their own country and those on the ODWs visas that have escaped their employers to find a new job, the employer does not pay them according to the national minimum wage or at all.

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<sup>44</sup> (43/75) [1981] 1 All E.R. 122, para 40

<sup>45</sup> *Bilka-Kaufhaus GmbH v Weber von Hartz* (170/84) [1986] E.C.R. 1607; [1986] 2 C.M.L.R. 701



*We talk £600 for month. You holiday [employer promise] don't worry everything sign no problem (referring to the agreement submitted to the UK Consulate in Riyadh). Then after here come (arrival to the UK) problem. Food problem, month also give me only £100. Also work too much, 2 babysit, cooking, cleaning, and ironing, everything to do until baby sleep. Night time one baby sleep one side another baby one side, I am middle like that. Baby go toilet at night, problem. Here very difficult than Saudi Arabia (W.A.R, 36-40, Sri Lankan)*

### 6.3.6 NON-PAYMENT OF TAX AND NATIONAL INSURANCE DUES

Live-in domestic workers are often faced with the issue of Tax and National Insurance Contribution (ILO, 2010). For those domestic workers admitted before April 2012 who are still eligible to renew their ODWs visas, they must provide evidence that they have been paying tax and national insurance contribution before their visa could be renewed.<sup>46</sup> The empirical data showed that some employers do not want to be legally responsible for their workers' tax and national insurance contribution. Most employers prefer to pay gross to their employees and leave that employees to sort out own tax and national insurance due.

*...I think... my husband had a complete nightmare setting up all of the tax arrangements for her, it was absolutely endless and I'm glad I didn't have to sort that out (F) because I think that could be a real pain, all the paperwork... (6109int31, 45yrs, British)*

Most domestic workers stated that they had to pay national insurance dues and tax on their own. They do this by registering as self-employed with an online agency as most ODWs in the UK usually do (Sollund and Leonard, 2012; WEIGO, 2014). The failure by the employer to pay tax and national insurance on behalf of the domestic worker could put the domestic worker affront of the law and may adversely affect the chance of the domestic worker to make any legal claim under the contract.

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<sup>46</sup> <https://www.gov.uk/Government/publications/overseas-domestic-workers-in-private-households-wrk21/overseas-domestic-workers-in-private-households-wrk21--2> last accessed August 7, 2015

### 6.3.7 EXCLUSION FROM HEALTH AND SAFETY PROTECTION

In the view of Berlin et al. (2011), the type of job as well as the working conditions the workers are faced with could have powerful effects on their general wellbeing, health, impact on their finances, personal development, social relations and self-esteem. In the UK, domestic workers' health and safety condition is complicated by s.51 of the Health and safety at Work Act,<sup>47</sup> which specifically excludes them from protection. Similarly, domestic workers are excluded from any the health and safety related aspect of the Working Time Regulation.<sup>48</sup> Consequently, these workers are exposed to a series of health and safety hazards (ILO, 2010; Salih, 2013; TUC, 2013). According to the ILO Encyclopaedia of Occupational Health and Safety,<sup>49</sup> domestic workers occupational health and safety problems include physical, chemical, biological, and psychological hazards. The empirical data showed live-in domestic workers (especially those on the current ODWs visa) are not just vulnerable because of their immigration condition, they are also very prone to health and safety risks.

*I can remember when I say to my employer that I have headache and it was very bad, she never allow me to see doctor and she did not give me any medicine. My employer says you only have short stay visa here, you are not allowed to go hospital (Girly, 41-45 years, Philippines).*

Even those on the old ODWs visas whose employers were allowed to register with their GP recalled that their employers were not always sympathetic to them whenever they were unwell or needed medical attention. One of the participants recalled how her employers made her continue working despite being unwell and despite the doctor's advice.

*My employer was never very sympathetic if I was tired or unwell because of all that I had to do. In early 2008, I began to suffer shortness of breath. Although they allow me to go to hospital, they did not give me time off or allow me to rest. The doctor said I need to take time off to rest but my employer said no, I must work. (Mely, 46-50 years, Seychelles).*

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<sup>47</sup> 1974 c37, London: OPSI

<sup>48</sup> SI 1998/1833, London: OPSI

<sup>49</sup> <http://www.ilo.org/oshenc/part-xvii/personal-and-community-services/item/973-domestic-workers> last accessed August 18, 2015

### 6.3.8 THE PRECARIITY OF DOMESTIC WORK

The literature review showed that domestic work is a precarious job.<sup>50</sup> On the face of it, any “employment that is uncertain, unpredictable, and risky from the point of view of the worker” is a precarious job (Kalleberg 2009: 2). It has also been argued that precarious jobs “gives rise to instability, lack of protection, insecurity, social and economic vulnerability” (Tompas et al., 2007: 209), and exposes the workers to “erosion of earnings potential, workplace hazards and social risks” (Weil, 2009: 412). Low-skilled migrants, especially women from the developing countries now take on paid positions in the UK households; helping families to look after their daily chores including child care. According to Bhalla and Lapeyre (1997: 428), “the concept of precariousness involves a combination of different factors such as instability, lack of protection, insecurity and social and economic vulnerability”. The empirical research confirmed the concern in the literature that domestic workers often work very long hours without adequate rest.

*Then, even like in the beginning when I start with her, it was just agree with... Monday to Friday and then she forced me to work on Saturday with no money more. **She forced me to work** Saturday with no money. No extra money. Even on Sunday, if she have like visitor coming, the guest or something, she ask me to help her. She never give me one penny more. Just, thank you everything was done, never even one penny more (Sa, ODW, 36-40yrs, Moroccan).*

The participants clarified that although they do not often work non-stop from morning till night, employers often put them on standby; making it difficult for them to know when exactly was their free time. Some employers who sometimes entertain guests at home are more likely to request their domestic workers to work and/or be on standby until the guest has left. Thus, the workers may have to work until around 2.00 am to ensure the necessary cleaning is done before going to bed.

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<sup>50</sup> See for instance, Sargent, M (2014) *Domestic Workers: Vulnerable Workers in Precarious Work*, E-Journal of International and Comparative Labour Studies, 3(1), pp.1-19; See also Mantouvalou, V (2012), *Human Rights for Precarious Workers: The Legislative Precariousness of Domestic Labour*, UCL Labour Rights Institute On-Line Working Papers – LRI WP 2/2012.

*I had no rest. I was going up and down, up and down every minute. I'm sleeping till 1.00 – 2.00 in the morning and when they have visitor I have to sleep 4.00 or 5.00 o'clock in the morning. And whenever I just do my work upstairs doing ironing she keep on calling me just for, get them a glass of water so I have to go back and every 10 - 5 minutes they keep calling for these things.....I start around 6 – 6.30 till 1.00 or 2.00 in the morning again (S.A.S, ODW, over 40yrs, Indonesia).*

It is not uncommon for some employers to ask their maids to accompany them on holiday; even if all that the maids do on the holiday is to continue serving the employer. In some cases, the worker may not be given a prior notification.

*I can say [I worked] six days and a half because on the off day, the wake up very late and I have to come back very early. Sometimes, I didn't have a day off for like 3 weeks. Because me... the wife will set the weekend holiday and she will take the children and of course she will take me. For example, she will take me to the countryside. I cannot have my day off also there ... so for 3 Sundays, I serve 3 Sundays without any compensation (Su, ODW, 36-40yrs, Indonesia).*

The contention about employers asking their domestic workers to come on holiday or social outings with them is not only well reported in the literature but has also been contested in the courts. In *Nambalat v Taher & Anor: Udin v Pasha & Ors*,<sup>51</sup> the Court of Appeal, found in favour of the employer who had asserted that the domestic worker was treated as a member of the family because she was invited and taken on a family holiday. This was despite the fact that, throughout the holiday, all that the domestic workers did was “helping out by looking after the smaller children and contributing to other household tasks”.<sup>52</sup> Data obtained in the empirical research showed the majority of the employers mentioned that they have taken their domestic workers on holiday, and that the trip was for the benefit of the worker; an assertion that was contradicted by the domestic workers.

*I wouldn't go for coffee with her, but I would take her out, even if I don't need her to help me. So, now that we are here, for example, she's at a bit of a loose end so I would say to her 'Do you want to come with me'. If we're going to the park or something like that, even though I do not need her to be with me to help me with the children, I will say 'Do you want to come?' and (J) will say 'Let's bring her because she might like to see this or that'. But, I would never socialise with her the way some people do. (6109int34, 37yrs, Married, British, 2 children).*

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<sup>51</sup> [2012] EWCA Civ 1249

<sup>52</sup> [2012] EWCA Civ 1249 para 26 per Lord LJ

Although none of the employers admitted that they ever treated their domestic worker badly, quote such as the one above, which is typical of the majority of the employers' response, they rejected the argument/employers' assertion that taking their domestic workers on holiday is a way of treating them as a member of the family. However, given that the court is more inclined to believe the employer than the domestic worker, the domestic workers and their legal team would have to go to extra lengths to convince the court otherwise. Against this backdrop, the legal informants explained that employers often flexed their muscles in an attempt to discredit their worker.

*A lot of the time in these cases is professional; doctors, lawyers ...they see their workers as you know less in giving. You know, not capable of bringing complaints or doing this stuff. Some of them get it into their heads that somebody else have put them up to it and somebody else is pulling the strings and they assume that's us (lawyers). So you get employers whose first response (to a claim) is to try to attack the lawyer or the law centre so they would make... they would write to make complaints – you shouldn't be bringing this claim, you shouldn't be doing this. And they would try and do their best to get rid of you. There are some who then realise that that won't work. So what they then try and do is to phone you up and befriend you. I've had a number of occasion the other side phoning up saying oh common if you met me, you know I would never do something like this, let us all get together, we can put this to sleep. (JDB, Employment Law Solicitor)*

### 6.3.9 THE VULNERABILITY OF DOMESTIC WORKERS

Workers' vulnerability in the labour market varies according to their workplace and type of work (Frey and Osborne, 2013; Eurofound, 2010, O'Connell and McGinnity, 2008). The history of the ill-treatment of domestic workers in UK households is well documented (Davidoff, 1974; Delap, 2012; Horn, 1975; Taylor, 1979; Todd, 2009). According to Bhalla and Lapeyre (1997), those who are vulnerable stand the risk of being socially excluded. ODWs not only stand the risk of social exclusion, they also stand the risk of political and economic exclusion. According to the European Parliament (2007) policy statement, the 3 main factors of vulnerability are risk, personal, and environmental.

Whilst environmental factors relate to public perception and the law, risk factors are indicators such as the absence of trade union representation, absence of a collective agreement, a history of workplace law infringements, and poor record keeping (Pollert and Charlwood, 2009) that could make the vulnerability of workers more likely. The personal factors of vulnerability are those attributes that relate to the individual worker and are capable of determining the way the others perceived that individual, as well as the likelihood of the individual fitting well into the community (Brems, 2013; Giovannione and Sargeant, 2012). These attributes include, but are not limited to, socioeconomic background, work skills, and communication skills, age, disability (physical and mental health condition), nationality (immigration), race, ethnicity, gender, sexual orientation, religion, education, language proficiency, and family status.<sup>53</sup> Migrant workers' disadvantages in the UK labour market are exacerbated by their lack of English language skills (Kofman et al., 2009). This complicates their awareness and the ability to communicate in the host country.

In the view of the Trades Union Congress ("TUC", 2006), language and cultural barriers are a major high risk for migrants. Language barrier could raise the risk of adverse treatment by limiting the worker's outside job options and thus increasing their reliance on the employer and simultaneously lower the employee's capacity to protect themselves by limiting their access to advice and information (Bewley and Forth, 2010: 6). The vast majority of ODWs in the UK are from countries where English is not the first or official language (Kalayaan, 2014). This thesis empirical research showed whilst few foreign domestic workers, especially those from the ex-English colony, have a basic command of English; some literate ODWs are unable to read or write English.

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<sup>53</sup> See the European Parliament, *The conditions in centres for third country national (detention camps, open centres as well as transit centres and transit zones)* with a particular focus on provisions and facilities for persons with special needs in the 25 EU member states, Directorate-General Internal Policies, Policy Department C, Citizenship Rights and Constitutional Affairs, REF IP/C/LIBE/IC/2006-181 – December 2007

The empirical investigation showed that the language barrier has prevented some domestic workers from communicating freely or socialising with people outside their employers' house. The majority of the domestic workers stated that they found it difficult to socialise with people at least in the first year of arriving in the UK. Those whose employers allowed them to go out on their own required basic English language skill to socialise. To ease this barrier, some of the domestic workers ended up having to communicate with people or family members back home.

*At first I didn't have any communication. Actually for the first week... more than one week I didn't have access [to the internet]. We don't have internet....[Then in] July she decided to have the internet at home because she gonna be working at home. So she put internet in the house and then I try to communicate with my sister through Facebook. That's it (DF. 36-40 years, Philippines).*

The International Organisation on Migration (IOM, 2002) agreed that labour migration poses one of the principal challenges to migration policymakers in the twenty-first century.<sup>54</sup> These challenges have further complicated the plights of immigrants. Consequently, as Adamson (2006) has put it, the problems faced by immigrants go beyond vulnerability in the workplace and covers all aspects of their day-to-day activities. Research has shown that domestic workers on the current ODWs visa and migrant workers without legal immigration status are among the most vulnerable group of workers because they could not benefit from employment law protections (HRW, 2014). Historically, those lacking other means of subsistence perform domestic work.<sup>55</sup> It is thus not surprising that the majority of the ODWs in the UK are from poor socioeconomic background (Kalayaan, 2014).

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<sup>54</sup> IOM (2002), Trends In International Migration, Information Documents, Labour Migration, Eighty-Fourth Session, MC/INF/256, 31 October 2002, International Organisation for Migration, p.2

<sup>55</sup> See ILO – *Bringing Domestic Workers into the Formal Economy: Implementing ILO Convention No. 189*, A background paper for the Informal Meeting of Ministers of Labour and Social Affairs hosted by the Irish EU Presidency during the 102nd Session of the International Labour Conference, Geneva, 18 June 2013, p.3

According to this research empirical data, central to the domestic workers' reasons for travelling to work abroad is the belief that they will escape poverty, make money, and be able to support their family.

*I ... Was able to come to abroad just to seek for a greener pasture, a good...money for their [children] future. Because **in the Philippines, we could hardly earn that much.** Working [here] we can support all the living they needed especially their studies and going to University. Because going in the University is the whole concept of going abroad just to **sacrifice for the good future.** Because we believe that education is the best we can **give to our children** (DF, ODW, 36-40 years, Philippines)*

The altruistic idealism in the quote above was shared by the majority of the domestic workers who considered it a pride (culturally construct). Worth mentioning that in the Philippines and in the vast majority of the countries where the domestic workers came from, the socio security payment is either too shallow or non existing. Thus, the willpower to ensure that their family, especially children have a better future prompted the workers to travel abroad.

*Looking at the street children, **children in the street is everywhere in Manila**, I just feel like – no, **my children will never be like them.** So that's why I come here. I also see the father of my children who did nothing really to ensure that the children don't go hungry. And it frightened me really. I am looking at that kind of situation and as a mother; I have to do something **to ensure that my children will have a better life.** That, they will not be starved, that they will have education (MB, 36-40 years, Philippines).*

The lack of, or inadequate financial support from the husband or partner, has left some of the workers to fend for themselves and their children by themselves. The majority of the participants qualified their partners as unsupportive. One participant from Indonesia recounted:

*My husband doesn't work and this is so hard. I spent ten years with my husband, he didn't do anything. It was only me trying... Every time I try to sell clothes, like give them [customers] credit. [But] many of them didn't pay for me and don't have the money. I try to get another job... just like... I have two kids, little kids. And then every day I was thinking what I have to buy tomorrow for the kids because this is too hard and my husband didn't have work (NM, 31-35 years, Indonesia).*



The above participant had previously travelled to work as a domestic worker in Saudi Arabi where she made some money and returned home to her family. But because her husband did not support her financially the little money she brought from her trip ran out quickly. Besides, she invested her money in her clothes-selling business but soon became bankrupt because the customers refused to pay the money they owed to her. Besides, because of the need to secure a better future for their children, domestic workers also mention the need to care for the health of their extended family owing to the lack of free health services (a cultural belief). One of the participants was a minor when she left her home country to seek work abroad. Like most of the participants, she initially travelled to the Middle East/Gulf Country before being recruited to the UK.

*The first time I worked as a domestic worker when I was 15 years old. .... I don't have a good education so I can't find better job in my country. And this is so difficult for me to find a job that time. So I decide I have to go to the Middle East. That time I was still single. I want to help my family, - my brother and my sister to **have a better life**, and better future to get a good school at the time. And because I had **no choice**, that's why I decide to going abroad (T, 21-25 years, Indonesia).*

The determination to make it abroad acts as a catalyst and has encouraged the workers to take on any role in the household regardless of the work conditions; so long as the salary, irrespective of the rate, is promised to them (ILO, 2010, Lalani, 2011, OHCHR, 2011). Some employers who sang praise of their domestic workers also noticed this altruism.

*Migrants certainly have a great incentive to work. Insofar as they probably haven't got family to support them here and they're probably supporting families overseas. All the Filipinos I've ever employed have always sent money home. They only keep about half their salary (6109int36, 58yrs, British).*

In the view of British employers, most of whom are expatriates abroad, some domestic workers are desperate to be employed by British expatriates in the hope that they can return to the UK with the employer. According to these employers, most domestic workers preferred the UK because of the opportunity to obtain settlement status and citizenship.

*But certainly in Hong Kong we were aware right from the beginning that one of the great benefits of having lived overseas to us and for the girls who were just desperate, was the opportunity to come here [UK] and of course once they had done four years here [continuous residence] they can settle here (6109int33, 40yrs, Married, British).*

Ironically, employers who fully realised that a worker is highly desperate can take advantage of the desperation to offer the worker a bargain that will not tempt an ordinary worker. This desperation can also expose the worker to human traffickers.

*My employer arranged my travelling through her sister in Seychelles. I was told that I would be coming over on a tourist visa, then after a few months this would be changed into a permanent visa. I was told my employer was a lawyer, and that she would make all the necessary arrangements with no problem (Mely, 46-50years, Seychelles)*

Nonetheless, in their desperation for a job abroad, some workers are prepared to go to any lengths just to get out of poverty and out of their country (Anti-Slavery International, 2003). It is not uncommon for migrant domestic workers to borrow money to pay for their travelling costs abroad (HRW, 2012). In most cases, due to the inability to provide surety for a loan, the majority of the migrant domestic workers are unable to borrow travel money from the high street banks (Anti-Slavery International, 2014). Consequently, they end up borrowing money from loan sharks, believing that they will be able to repay the money as soon as they have arrived abroad and started to work. But this belief does not often match with the reality.

*I was going via agency [arranging plan to travel abroad] and then I was paying \$2,000.00. But \$2,000.00 is too hard for me so I have to borrow money from somebody and give them back after I get the salary here. But this is like pay in double [referring to the interest on the amount borrowed] (Sa, 36-40 years, Morocco).*

There is no gainsaying that a good domestic worker must be skillful in the act of multi-tasking (Galotti, 2013; WEIGO, 2014). However, as domestic workers are often generally categorised as unskilled workers, their presence and the services they render are hardly recognised and/or commended (Du Toit, 2013).

The UK Government's decision to allow only the brightest and the best to come and work in the UK (Gower, 2012) means that low- and non-skilled workers (a group to which domestic workers are aligned) are not welcome in the UK (Pero and Solomos, 2013). But, the review of literature and this empirical research has shown ODWs are still required in the UK. So long as the Government continue to issue the ODWs visa, migrant domestic workers will continue to arrive in the UK annually. The personal attributes of the workers such as being too timid, or 'too respectfully' (cultural differences) may be misconstrued by the employer and as such, may hinder effective communication between the employer and the worker. Effective communication with people of different cultural backgrounds could be challenging, as some employers may misinterpret the culturally inclined behaviour of the worker as unwilling to integrate.

*There was a Spanish lady who was doing part-time in our old house who wasn't very good...she was a bit moody and she didn't take instructions very well, she didn't take instructions from me very well, so that was the worst one we've had. She just had a kind of attitude... especially when she was around my Mother-in-law, which didn't go down very well; I think there was a bit of a power struggle between us all. **Obviously that was no good for us because the main reason you have help is so that you can rely on things getting done as and when you need, without a confrontation...**it just ended up with a really bad atmosphere in the house and that's totally unacceptable, and of course it was no good for her (6109int31, 45yrs, British).*

The essence of cultural differences and the need to understand this dynamic is evident throughout the empirical data. Culture is capable of influencing who we are; who we choose to be; the way we think; what we believe in; and how we relate to others (Adler, 2002). Understanding cultural differences could thus help in alleviating communication barriers and creating better interpersonal relationships.

*[Culture] can sometimes be a problem, just because their culture is different and just funny small things that you perhaps might not approve of, just silly things where you think, why is she doing that? I remember one example, she was changing her nappy one day and she was saying to her 'come on birdies, come and eat (Katie's) you-know-what, come on' and so after that she kept saying it, you know just stupid things, and then like she'll say to (Katie) 'if you don't put your tights on a cockroach will bite your toes', that sort of thing but that's just their culture. And she used to say 'if you don't stop talking a cockroach will run inside you', stuff like that. It's just not appropriate; you know (6109int34, 37yrs, Married, British, 2 children).*

Despite the above employer not believing that the domestic worker was being rude or abusive to her children, she maintained some reservation in the way the worker had interacted with her children. It follows that in some circumstances, cultural influence could wrongfully make a person sound repulsive to others.

*I'll say to her, 'how long has this been in the fridge?' and she'll say 'well you are the one who bought it'. She's very definitive about certain things, which you know are absolutely not right but my husband always says 'she comes from the Philippines and she's not a highly educated person so you just have to take her with a pinch of salt'. And when she says, you know, when I'm breast-feeding and she'll say 'you must feed from both sides because one side is the drink and one side's the food'. And I'm like 'well it kind of is like that, but not 100%, you know, both sides are both'. Anyway, but she is very strong-willed'' (6109int34, 37yrs, Married, British, 2 children).*

Further, some of the employers stated that they are more reluctant to employ domestic workers from the African Continent due to the stigma that they are often unclean.

*African Domestic Worker – Now when you say Africans do you also include West Indians? ... Well, if you're talking about African women, or Black women then, again, I can **only quote stereotypes**, but it probably won't be good... ...because they're not as good at that type of work as Europeans, well Southern Europeans. I don't have those feelings personally, but that is the general feeling, the general perception (6109int32, 40, British, Housewife).*

It is clear from the empirical data that the majority of the employers, even though they did not admit to being racist, did not see any need to condemn the use of racial or derogatory languages against domestic workers; especially the black people from the African countries and the Philippines.

*They [Filipino maids] just don't pay attention. So you know you're always saying, 'Do you mind? You forgot to do this...' and, you know, it's not just once a week, it's sort of every day. 'Dozy' is what we call them. I mean, I know you're going to say I'm terribly racist, but that's what it is and I have lived over there, you get used to lots of different races and lots of different attitudes, so you learn to laugh at it and put up with it (6109int36, 58yrs, British).*

Legally, it has been difficult for domestic workers to claim that any ill-treatment by the employer amounts to race discrimination. In *Taiwo -v- Olaigbe and Another*,<sup>56</sup> the EAT upheld the dismissal of the claim by the domestic worker who had been mistreated by her employers on the ground that the mistreatment did not amount to direct nor indirect race discrimination but, the vulnerability of the worker. The domestic worker and her employers are of Nigeria origin hence, the court seemed to have find it difficult to understand how race discrimination could have been an issue in that case. In addition to culture and race, the empirical data showed employers have different criteria that they look for in a domestic worker such as being a female, not being too fat otherwise smart outlook, being attractive, well presented, and subservient. When it comes to religion values, most of the employers signalled that they would not employ a Muslim. This position was agreed by one of the Muslim domestic workers who stated that finding a job with a Christian family is often a major problem because most employers who are not Muslims are often not familiar with Muslim culture, save what they learn about Muslims from the media.

*I was looking for a job it was hard to find another job. Why, about the scarf [Muslim Hijab]. I found the job, when I go to the interview, they asking, are you wearing hijab always, I said yes, sorry no job you can't work with us (Sa, 36-40yrs, Moroccan).*

Nevertheless, it was obvious from the empirical data that one of the reasons employers preferred to employ a Christian domestic worker is that they are perceived as being trustworthy. For instance, employers often believed that a Christian would not steal from the house. One of the employers recalled how a non-Christian domestic worker stole from her.

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<sup>56</sup> [2013] UKEAT 0254\_12\_0503

*Whilst she was away (the Christian domestic worker was on holiday) and then this one came but I think she took a coat of mine. But she wasn't a Christian.....I think there was one girl who I had as a cleaner who I think took things, but I never really faced her about it, I lost a coat and things so it is a bit of a worry. That's why I like to have a Christian because you feel as if they wouldn't [steal] (6109int37, 53yrs, British, Housewife).*

On the other hand, the majority of the workers who were Christians stated that when employed by Muslim employers, the employers often force them to wear Islamic dresses (especially wearing the hijab to cover the head) and 'behave in a Muslim way'. Seldom, the employers would prevent them from going to church even on the day off. Whilst some Christians go to church on Sundays, other attend church services on Saturdays (Guy, 2011; Oliphant, 2010). Ideally, employers should check with their Christian domestic workers if it was ok before booking events for weekends.

#### **6.4. POWER IMBALANCE – A DETRIMENT TO DOMESTIC WORKERS**

Power imbalance between the employers and their domestic workers is historical (Delap, 2012). Although all employment relationship have a master-servant input in them (Sargeant and Lewis, 2012), when it comes to the ODWs the master-servant relationship is too obvious and more onerous due to various extrinsic and intrinsic factors such as the worker's personal characteristics, unfavourable employment law, the over-dependence on the employers for their immigration status (HRW, 2014), and a lack of enforcement and/or scrutinisation by the appropriate authority. The ILO has for long acknowledged that the relationship between domestic workers and their employers is one that is hidden from the outside world; often undeclared and not governed by a mutually agreed written contract; and remains outside the scope of labour inspection.<sup>57</sup>

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<sup>57</sup> See ILO (2010), *Moving toward Decent work for Domestic workers: An Overview of the ILO's work*, Working Paper 2 / 2010, Asha D'Souza / ILO Bureau for Gender Equality, Geneva: ILO, p.18

The power imbalance between the parties could allow unscrupulous employers to get away with imposing any terms on domestic workers and varying same at will; without the worker being capable of mounting any meaningful challenge.<sup>58</sup> Bewley and Forth (2010: 6) argued that it is “conceptually more valid to consider risk factors as those which increase the relative bargaining power of the employer and capacities as those which increase the relative bargaining power of the employee”. An employee is vulnerable when the risk of exposure is high and the capacity to protect him/herself is low. The power of the employer to hire and fire cannot be compared with the power of the employees, which relates to skills. This thesis empirical research showed majority of the employers are unaware of their domestic workers rights.

## **6.5. AWARENESS OF RIGHTS – AN INDICATOR FOR MISTREATMENT?**

More interestingly, the empirical data showed some employers seemed not to be bothered whether their workers have any rights or not. Asked to the employers whether domestic workers are entitled to labour rights and whether they think that domestic work should be regulated. Their responses showed a wide range of disparity between the British and the non-British employers.

*I don't know what their rights are really. Do they [domestic workers] have any rights? .... There's always a problem with regulations, and getting everyone regulated. (6109int32, 40yrs, British, Housewife).*

Whilst the above comment cannot be generalised (Flyvbjerg, 2013; Yin, 2003), it makes one to wonder whether an employer who is unaware of the employment rights of his/her worker(s) would treat the worker(s) with respect and dignity.

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<sup>58</sup> A unilaterally imposed change(s) to a contract could radically change the terms and conditions of the initial contract to the extent that the initial contract could be taken to have been repudiatorily breached and/or terminated [see *Hogg v Dover College* [1990] I.C.R. 39; *Alcan Extrusions v Yates* [1996] I.R.L.R. 327; *Bampouras v Edge Hill University* (2010) 154(4) S.J.L.B. 28]

It is therefore not surprising the ILO (2013) has asserted that domestic workers worldwide are not adequately protected by law. The current situation of the affairs of the domestic workers in the UK (Anderson, 2010, HRW, 2014; Kalayann, 2014) support the fact that the majority of employers of domestic workers are ignorant of the limited rights available to their domestic workers. One of the British employers who was of the view that there is no need to regulate domestic work impliedly remarked that migrants, especially those who are illegal should not expect to be treated nicely by their employers.

*I know the employment law in terms of part-time working, but around here I don't think you need to regulate because there's enough demand so that people aren't being exploited because if they were getting exploited they would just walk, so actually I think it's not an issue around here. ...I think to be fair, it [mistreatment] would apply more to your migrants, wouldn't it? And if they are going to come over here, they know the score. I mean I'm not saying it's right that they should be exploited but you know, I think they would know what they would be letting themselves in for a little bit more (6109int38, 40yrs, British).*

The fact that the employers who are traditionally more powerful than the domestic workers have had their position strengthened by the exclusion of the ODWs from some of the protections that are available to the other workers has warranted a need to review and boost the workers' position. To maintain consistency, make employers aware of their ODWs rights, alleviate domestic work, and make the domestic workers more visible to the public have prompted the ILO (2013) to advocate for the regulation of domestic work worldwide.

## **6.6. REGULATING DOMESTIC WORK: IS IT REALLY NECESSARY?**

One of the recurring themes in the literature which was supported by this thesis empirical research is that domestic work should be regulated in line with the current ILO framework so that the workers could become more visible to the law and the public with a view to alleviating their problems.



The volume of literature (published and unpublished) on the need to regulate domestic work in the UK and around the world is vast (Eurofound, 2012; HRW, 2014; ILO, 2013; Kalayaan, 2014; Triandafyllidou, 2013; UN Women 2013; WIEGO, 2014). The two major concepts that have emerged from these publications are that (1) domestic workers invisibility to the public and the law has resulted in their social exclusion, worsened their live experience, and continue to have greater impact on the life of the workers.<sup>59</sup> (2) The restrictions placed on the workers by the ODWs visa have taken away all there rights, especially the right to change employers. Consequently, the workers have been made more vulnerable to exploitation and abuse. As such, there are suggestions that if the workers have the right to change employers and domestic work is regulated, the workers would become more visible to the public and their negative experiences will improve (HRW, 2014; Kalayaan, 2014). Nevertheless, amongst the problems affecting the regulation of domestic work is the scope of the job and the nature of the workplace. According to Barrett and Sargeant (2011: 9), ‘‘it is precisely because domestic workers are employed within the private sphere that there is resistance to recognizing the domestic work relationship, and appropriately regulating it’’. To rectify this problem, the Government must take the initiative to set standard, enact and/or promote actions that would make the workers more visible to the public. Setting a standard for domestic work would promote decent work for these workers, make them more visible, protect their fundamental rights at work, improve their working conditions, and provide them with social security (ILO, 2010). The lead ILO document on the protection of domestic workers is the framework that was adopted in 2011 by the international labour conference.<sup>60</sup> This framework sets the current standard for domestic workers around the world.

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<sup>59</sup>Department of Business, Innovation and Skills – *Evaluation of the Vulnerable Worker Pilots Year 2 (Final) report*, Katie Shearn, Ben Knight and Ashvinder Kaur Matharoo / BIS, Employment Relations Research Series, No. 108, London: Department of Business, Innovation and Skills, 2010

<sup>60</sup> ILO (2011) *Domestic Workers Convention, 2011 (No. 189)*, Convention concerning decent work for domestic workers (Entry into force: 05 Sep 2013), Geneva: 100th ILC session

Notably, amongst the key aspects of domestic work that the framework sought to promote include contract of employment, minimum wage, working time, and maternity protection. As a result of the continued refusal of the UK Government to adopt and implement the ILO convention 189, domestic workers in the UK are currently at a disadvantage. They continue to experience social isolation, abuse, and exploitation that was suffered by their Victorian era counterparts (Delap, 2011). This thesis empirical research showed that both the legal and non-legal informants were deeply concerned about the current state of affairs of these workers. The non legal informant in particular, was critical of the assertion by the Confederation of Business Industry that represented the UK Government at the 2011 ILO conference that UK laws adequately protect domestic workers.

*It's quite astonishing the CBI [Confederation of Business Industry] talked about working time, in their contribution to the debate. Although the UK Government abstain from the vote, during the debate, they were very much oppositional. The CBI claims working time protection did apply to domestic workers? Either they are completely ignorant, which is not impossible, I might add, or they were deliberately been misleading because they don't apply (NC, Researcher/Union Activist).*

The above assertion fell short of the reality as evidence in the literature and as highlighted in the findings of the empirical research for this thesis. Giving the long history of abuse and exploitation that has been going on in the households (Delap, 2012), it is surprising that rather than having a legal regulation of domestic work, the majority of the British employers was in favour of 'self-regulation' and mutual understanding between the employer and the employee. Although the doctrine of freedom of contract, which the common law in *Printing and Numerical Registering Co v Sampson*<sup>[2]</sup> by (1875) 19 Eq 462 recognised as the right of two people to enter into contract supports the employers position, Lord Denning MR in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd*, [1982] EWCA Civ 5 cautioned that the power imbalance between the parties in contract must be taken into consideration in deciding whether the terms of the contract is fair.

As such, to assert that the employers and the domestic workers could genuinely negotiate their own terms of agreement would appear to be a beggar's belief. It is clear from the empirical data that British employers who were expatriates, employed domestic workers on the same term and condition as the locals; even though the terms and condition were very poor compared to the UK standard. In the aspect of remuneration, the majority of employers believed that the amount of remuneration should be a thing for the employer and employee to agree; as opposed to something to be regulated by law. Again, while, such preposition may not offend the "golden rule of employment contract" (Carole, 2013: 143; George et al., 2011: 306; Miller, 2010: 10), history has shown that domestic workers and their employers do not have equal bargaining power (ITUC, 2014). Furthermore, despite the Home Office publication,<sup>61</sup> which confirmed domestic workers are entitled to holiday pay, and despite the agreement by the vast majority of the employers that domestic workers should be so entitled, none of the employers could recalled if they ever give their domestic workers any holiday pay.

*Now then I can't remember. Did I ever pay holidays? No I don't think I paid them for their holidays. No one ever used to take holidays (6109int32, 40yrs, British, Housewife).*

It is noteworthy that the British employers in particular, were also negative towards the idea of domestic workers entitlement to the national minimum wage and standard contract of employment. One of the British employers who had previously lived in Hong Kong stated:

*Well in Hong Kong it was very well organised, you had to have a formal contract of employment and they had to be stamped by the Government, there was a certain format and there was a minimum wage and you had to do all these things so it was very regulated. Here (UK), even when I did pay my full-time [domestic worker] and did all of my taxes and insurance, it wasn't regulated at all in any other way, just so long as you paid the tax. ....*

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<sup>61</sup> Home Office: *Domestic workers in private households*, Guidance – Domestic workers in private households – v9.0 Valid from 12 December 2013

.....A written contract, well I don't mind that but it would have to say what I wanted it to say, you know, like, no maternity leave but on the whole I've never employed people of a baby-having age because it's too much trouble. Sick pay, yes, I think for a certain amount but if it goes long-term then things have to be negotiated... Annual visit home, I think probably every other year, if it's to the Philippines. Europe is different but it's such a long way. I always did contribute to that. **I don't now because she's part-time [her employed domestic worker] so it's different.** .... Trade Union membership, I wouldn't bother with that...Regular days off, yes I think that whatever you agree you stick to...Holiday pay, yes...Telephone, no...Pension, no...it's up to them...**Minimum wage, that doesn't apply.** (6109int36, 58yrs, British).

The above position was shared by the majority of the employers who hinted that if a contract must be issued, the employers must be free to dictate its content. In the view of some of the employers, as far as the written contract could protect their position in case of litigation or any argument, they would not mind issuing one to the employees.

**I wouldn't like a written contract because then you would be stuck with them if anything bad happened or you lost something.** Sick pay, yes I suppose I should pay sick pay but I haven't. Regular days off, yes. Holiday pay, yes, usually. No, they don't use my telephone, not to Brazil. **I assume she has a work permit.** Fixed hours, yes, I'm very keen on that because that's what makes me sad about the Filipinos. Their own room, yes, and bathroom. They can bring boyfriends in here and in the garden but not upstairs because I think it's a bad thing for my children to see that (6109int37, Housewife, 53yrs, Married, British).

However, contrary to the perception of the employers, all of the informants agreed domestic work in the UK needs some form of regulation in order to provide work and social security for the workers and to ensure their health, safety, and well-being. Although, all the informants agreed that the current UK employment law does not oblige employers to issue employment contracts to their employees, they also asserted that the fact that the Home Office specifically required employers to issue contracts of employment to their domestic workers means the need to issue employment contracts to domestic workers is paramount. In the informants' opinion, employers often tend to refuse to give their workers a standard contract because it could limit their control over the worker, and it could give the worker something to legally rely upon.

*Usually they don't have pay slip. Usually they don't have accurate contract of employment. There may be a contract of employment they send to the Home office [but it] rarely reflect the kind of work that they are doing. ....**The whole relationship is based on the assumption that this people are not entitled to employment rights ...** If there is a payment going on its likely to be well below the national minimum wage, which is current £6.00 and hour we have people who have been paid say 40p an hour or something like that (JDB, Employment Law Solicitor).*

Whilst the Spanish employers saw no harm in regulating domestic work, they, like all of the employers, made some reservations on the entitlement of domestic workers to maternity pay and pension, which they consider unprofitable and very expensive. The employers, who suggested that maternity leave is one area too far in the regularisation of domestic work, added that any imposition of maternity leaves pay on the employers would create an unnecessary burden on them and puts employers off from employing domestic workers of child-bearing age. However, contrary to the employers' perspective on the domestic workers right to maternity leave and pay, the informants argued that in line with the ILO Convention 189, domestic workers should be entitled to a paid maternity leave. They added that although pregnancy dismissal is not specific to domestic workers, it is very common in the sector than in any other sector.

***Somebody was dismissed soon after she informed them that she was pregnant and that is not uncommon. It is very common for all women, but domestic workers are more vulnerable all other workers. Migrant workers are more vulnerable than indigenous worker. Actually, pregnant woman dismissal is widespread. There right exist, but it comes at a time when the individual takes the case (NC, Researcher/Union Activist)***

The ILO has consistently argued that the simple fact that the vast majority of the domestic workers were female <sup>62</sup> is indicative that the lack of maternity protection for this group of workers could be discriminatory.

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<sup>62</sup> See D'Souza, A. (2010) *Moving towards Decent Work for Domestic Workers: An Overview of the ILO's Work*, ILO Bureau for Gender Equality working paper 2, Geneva: ILO

The empirical research shows that the informants also considered the refusal by employers of domestic workers to recognise and give their domestic workers a right to maternity leave as a form of discrimination.

*The one thing I would say with pregnancy cases I have done is where I have a client who have become pregnant and they find a particular aspect of their job difficult to do. Where they have gone to employer to alter that work regime or don't feel able to... The employer has been extremely resentful at the idea of having to reduce their workload also the types of jobs that they should be doing where they struggling..... And a lot of time I don't think the client is able to even raise that such of topic with them and has to struggle on. ... The European Law on health and safety etc. on pregnancy for workers are extra-ordinarily strong and one that you can say is robust. **If a woman who is pregnant, whether she works in a private household or she works in marks and Spencer's, is unable to work due to pregnancy and the doctor certify this, her employer must make alternative work arrangement available. If the employer has no alternative arrangement, they must put her on maternity suspension; pay her full salary (JN, Solicitor/Judge).***

Notably, the informants' position on maternity leave and payment for the domestic workers is supported by the review of literature (Blofield, 2012; Lutz, 2012). However, it is acknowledged that this aspect is a grey area that would continue to pose problem for lawmakers and employers in particular. Unlike those working outside the private households who may be entitled to claim statutory maternity leave and social security funds, domestic workers on the ODWs visas, whether pre-April 2012 or not (except those who have acquire settlement status), are unable to recourse to public fund. It follows that, if the law makes it compulsory that employers must pay maternity money to their live-in domestic worker who become pregnant, the burden on the employers might be too much.

*Well, this is mostly for live-in isn't it? I think for a private domestic worker, paid maternity leave, you know you're not a company and I think it's quite a heavy price to have to pay, on the employer and I think if you made it an employment right people would just not do it within the law, they simply wouldn't have contracts, which is actually what happens now anyway, because, you know, one person can't be expected to pay for someone to have six months leave from work (6109int36, 58yrs, British).*

Without regulating domestic work, most domestic workers are too vulnerable to the extent that they can be easily exploited (HRW, 2014; ILO 2013). Meanwhile, other forms of discrimination that was identified by the informants include race discrimination. In the view of the informants, the fact that the domestic worker and the employer are from the same race is irrelevant. They argue, a member of protected group can unlawfully discriminate against a member of another protected group. Accordingly, a woman can discriminate against a woman, a Hindu could discriminate against a Hindu, and most Tribunal are easily sophisticated enough to understand that. Further, the informants are of the view that discrimination against domestic workers could be tied to different levels of engagement between the workers and their employers. These include issues such as contract of employment, working condition, and remuneration.

In the view of the informants, if the reason why the employer has given the domestic workers, poor terms and conditions and/or the reason why employer has mistreated the domestic workers is because he/she is a foreign national on the migrant domestic worker visa, then technically, a discrimination complaint could be made out (Sargeant and Davies, 2012). Nonetheless, as one would expect, all of the domestic workers were in favour of regulating domestic work the UK. The informants share the domestic workers complaint that the current ODW visas, in particular, put domestic workers in a very awkward position. The domestic workers were in favouring of the restoration of the old (pre April 2012) ODWs visa, which Oxfam and Kalayaan (2008) argue, gave them more right and protection. The workers also call for the enlightenment of the employers and the public to the rights of the domestic workers.

*I just need my right as a worker so what make a difference between me and my other fellow domestic worker. They can get the visa, they can visit their home to see their children, their family and then come back here. I say why not me (WM, 36-40years, Indonesia).*

## **6.7. CONCLUSION**

This chapter has shed further light into the legal problems of domestic workers. The chapter has shown that in addition to immigration constraints caused by the hostile immigration policy of the UK Government, the ODWs visa has made the residual rights available to the ODWs difficult to rely upon. The employment rights of the ODWs is a qualified one because of the wordings of the law and judicial interpretations. On the one hand, the fact that domestic workers are vulnerable workers who work in precarious job that is hidden to the public is problematic. On the other hand, the exclusion of the workers from legal protection make their experience in and outside the labour market more unpleasant.



## **CHAPTER SEVEN**

### **Conclusion, recommendation, theoretical contribution, and limitation**

#### **7.1. GENERAL CONCLUSION**

This research has strengthened the assertion in the literature that in addition to the natives, migrants, especially those from the developing countries around the world continue to migrate (legally or illegally) to the UK to work in the private and diplomatic households. This further confirmed that foreign domestic workers are still relevant to the UK labour market. It follows that the restrictions placed by the government to discourage foreigners from coming to the UK has so far failed to reduce the number of ODWs arriving in the UK. This conclusion is confirmed by the Home Office record that showed the number of visa issued annually to foreign domestic workers since 2012 that the new ODWs visa was introduced has not changed (Gower, 2015).

The ODWs are often from a very poor socioeconomic background. These attribute combined with other factors such as the lack of opportunity in their homeland constitute a risk, which potentially increases the workers vulnerability to trafficking, exploitation, abuse, servitude, and modern day slavery. Nonetheless, the fact that the ODWs are often from poor socioeconomic background does not in itself explain why they experience adverse treatment inside and outside the labour market more than the other foreign workers. A worker might be poor and desperate, but if other people do not exploit that poorness or desperation, he/she may not suffer any detriment. Consequently, even though the domestic workers personal attributes could make them vulnerable to trafficking and servitude, they may not become victims of trafficking or experience force labour if somebody has not taken advantage of their vulnerability.

The empirical and doctrinal research support the assertion in the literature that the ODWs are vaguely protected by law, and that the exclusion of them from health and safety, working time, and employment protection is not by accident but a deliberate action by the government who probably think less of them. Thus, in addition to the workers' vulnerability, factors such as precarious immigration status, social exclusion, lack of legal protection, absence of worker union, and low pay could increase the chance that someone would take advantage of their vulnerable status. In *Onu v Akwivu & Anor; Taiwo v Olaigbe & Anor* [2014] EWCA Civ 279, a lead case concerning the mistreatment and victimisation of ODWs by their employers, the Court of Appeal held that the adverse treatment they experienced was as a result of their status as vulnerable migrant workers as opposed to their race or nationality. In the view of the court, the domestic workers' vulnerable position is not attributed to a particular racial group or a particular group of migrants. In a way, the decision puts the blame on the domestic workers' socioeconomic vulnerability. This thesis argued that the decision was flawed because it is not all workers that are socioeconomically vulnerable that will experience maltreatment in the labour market (TUC, 2008); much would depend on the type of work, place of work, right to work, and the legal protection that are available to the workers. For instance, ODWs from the Phillipines do not enjoy the same rights in the UK as the Filipino nurses on supervised or full practice in the UK. This is despite the fact that the nurses and the domestic workers are from the same country and may have come from similar poor background. To determine the root of the domestic workers' problem, one has to look beyond the workers' personal attributes and examined other factors, which could make it easier for someone such as the employers to take advantage of them. It is therefore necessary to consider the impact of precarious employment, the effect of law, Government policies, as well as institutions and environmental factors that may impact on these vulnerable workers.

On the face of it, the fact that domestic job is stereotyped or stigmatised as dirty job (Hughes, 1951; Anderson, 2008) does not make it worse than the other jobs. Dirty job in this instance “refers to jobs, roles or tasks that are seen to be disgusting or degrading” (Brooks and Simpson, 2012: 55). There are several other ‘dirty jobs’ in our community such as garbage collection, drainage cleaning, sewage disposal, etc. (Ashford and Kreiner, 1999), but people in those jobs do not often experience exploitation and abuse in the same way that the domestic workers do.

Similarly, footballers for instance are exposed to sport injuries and their work is precarious (Dex, et al., 2000) because they work under short term contract; yet they do not suffer adverse treatment like the domestic workers do. Also, ignoring the fact that a good numbers of professional footballers in the UK are immigrant,<sup>1</sup> the current Governor of the Bank of England, Mark Carney is a Canadian, yet it has not been reported that he is disadvantaged. As such, the simple fact that some if not most domestic workers are non-native workers does not clarify why domestic workers suffer adverse treatment. It was therefore necessary for this thesis to consider if the work and work places have any effect on the domestic workers’ problem.

The household as an informal sector is a hybrid between the private and the public (ILO, 2000; Meagher, 2013). In addition to its private and confidential functions, by employing workers the household is performing a public-regulated function. This hybrid function distinguished the households from the other private and public workplaces. The review of legal and non legal literature conducted for this thesis showed the likelihood that the Government often see more of the private nature of the households and less of its public nature.

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<sup>1</sup> Bowman, B (2011), *Is international football migration simply another type of labour migration?*, EU50605 – The Politics of Migration. 6th May, 2011  
[http://people.bath.ac.uk/bd203/docs/Bowman2011\\_internationalfootballmigration.pdf](http://people.bath.ac.uk/bd203/docs/Bowman2011_internationalfootballmigration.pdf) last accessed August 27, 2015

This could explain why the households are excluded from some of the labour law that applies equally to all other workplaces (Albin and Mantouvalou, 2012). This exclusion puts the domestic workers who are already vulnerable, in a more disadvantaged position compared to the other workers. Further, the exclusion could explain why some employers of live-in domestic workers take advantage of the workers' vulnerability. As evident in the empirical research, some employers are possibly not aware that their domestic workers have any rights.

*I don't know what their rights are really. Do they (domestic workers) have any rights? (6109int32, 40yrs, British, Housewife).*

The above argument puts the Government policies on domestic workers in the spotlight. The council of European Union argued that “international migration is a reality that will persist as long as there are differentials of wealth and development between the various regions of the world”.<sup>2</sup> Putting this into context, domestic workers from the third world country would most likely continue to migrate to better performing countries like the UK in an attempt to escape poverty and or seek a better future. However, one of the problem that migrants are faced with is that immigration law and employment law are indissociable (Nelles, 1931; Sargeant and Tucker, 2012). The person's immigration status would determine his/her rights in the labour market. The empirical research found that the tension between the domestic workers immigration status and their employment rights in the UK is a very important factor in finding the root of the workers problems. Immigration is a quintessential multi-dimensional issue that impacts on every dimension of domestic and foreign affairs (White, 2012). Thus, the control of immigration is quintessential in a democratic society (Koulisch, 2010).

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<sup>2</sup> Council of the European Union. "[European Pact on Immigration and Asylum](#)." 13440/08 ASIM 72, Council of the EU, Brussels, September 2008.

In so far as States' obligation under customary international law and treaties are taken into consideration, individual States is in the best position to decide which immigration policy it chooses to adopt. As such, the decision by the current UK Government to drastically reduce the numbers of immigrants to the UK is not justiciable. However, in the interest of justice and to ensure a moral justification for the UK acclaimed lead country that promotes human rights,<sup>3</sup> it is only right that whatever measure the Government apply to migrants should apply evenly to all of them without directly discriminating against a particular group of migrants. The UK Government selective immigration policy that continue to ignore the plight of the ODWs, the majority of which are women, is a major concern.

There is nothing wrong with the Government policy that encourages those who are in need of domestic workers in the UK to employ them from the UK labour market rather than recruiting domestic workers from the overseas. However, the Government assumption that there is no market for the ODWs in the UK originated from a misconceived idea that migrants from EU countries such as Hungary, Bulgaria, and Romania would work as domestic workers in the UK (Anderson, 2008; Frattini, 2014; London Chamber of Commerce and Industry, 2010). The review of literature as well as the empirical research showed the need for the ODWs in the UK continues. The fact that the Government continues to issue the ODWs visas is in itself an evidence that the Government has not made its case that domestic workers from the non EU countries are no longer required in the UK. Given this, it is important that the wellbeing of those domestic workers who are issued visas to come and work in the UK should concern the Government. The fact that their employers expose domestic workers to exploitation and abuse is not contemporary (Delap, 2012). The need to improve the experience of the domestic workers in the UK led to the immigration concession for them in 1998.

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<sup>3</sup> Foreign and Commonwealth Office (2014) Human Rights and Democracy Report 2013. Available at <https://www.gov.uk/government/publications/human-rights-and-democracy-report-2013/human-rights-and-democracy-report-2013> last assessed August 12, 2015

But the new ODWs visas, which came into effect since April 2012 has removed all of the rights that were previously given to the workers and has made them more subservient to the employers by increasing their over dependence on the employer and removing all their legal defences (Kalayaan, 2014; HRW, 2014).

*[B]ut what the situation will be now with the new arrangement [new ODWs visa] is dread to think because they are totally dependent on the employer. (NC, Activist/Researcher)*

Unlike the pre-April 2012 ODWs visa that allowed the domestic workers to change employer if they have any reason to believe that their employer was exploiting or abusing them, domestic workers under the current ODWs visa are unable to change employers. Even where employers has treated the workers badly, they could not escape the employers for the fear of being asked to leave the UK or faced with deportation. The review of literature confirmed that if the ODWs cannot change their employers, it would lead to their inability to escape abuse and exploitation; and thus, an indicator of forced labour (HRW, 2014; ILO, 2013; Oxfam and Kalayaan, 2008). The 6 months maximum residence permit offered by the current ODWs visa means subject to a few exceptions, if unfairly dismissed, the workers would not be able to complain or bring a civil claim against the employer. This is because of the 2 years continuous working requirement for unfair dismissal (Dimond, 2011; Turner, 2013), which they cannot accrue. Further, with the exception of those ODWs who have been lucky enough to obtain settlement status, those who are on the ODWs visa (old or new) are not allowed to recourse to public fund. As such, they are excluded from social benefits, even though the empirical research and review of literature has shown that the majority of the ODWs pay tax and make national insurance contributions. Further, the withdrawal of legal aid from most of civil cases and the need to pay tribunal fees means that the chance of the ODWs bringing claims against bad employers has been drastically reduced.

Accordingly, even though all migrants are considered vulnerable in the labour market, the restrictions imposed on the domestic workers by the ODWs visa has made their experience unpalatable and have encouraged the employers to continue to take advantage of their vulnerability. To deal with the detriment in the current ODWs visas, the re-reinstatement of the previous ODWs visa and the effective introduction of checks and balances would be necessary.

*Simply re-instating the migrant domestic workers visa and the national minimum wage will be a very quick and simply fix. I think working time rights should apply and be enforceable and family workers exemption to be removed from minimum wage regulation. I mean, if you just choose those as package, it still doesn't resolve the central problem of the nature of domestic work **but at least start saying these are workers that have a right.** That, they have the right to enforce them, that they have the right to change employer. That gives them some bargaining power (JN, Solicitor/Judge).*

This thesis argues that the only reason some domestic workers were discriminated upon was not that they were vulnerable, but because the immigration law has removed the power they would have used to defend their vulnerable status. It follows that a rethink on the law on discrimination in so far as domestic worker is concerned is necessary. Rather than simply following the doctrine of *stare decisis* or performing unnecessary academic exercises, it is imperative that the interest of justice requires the court and Judges to familiarise themselves with the correct nature of domestic workers' vulnerability, the precarious nature of their job and immigration constraints. Further to the detriment imposed on the domestic workers by the immigration law, a domestic worker who has been trafficked for domestic servitude is unable to bring compensation claims against the employer and/or trafficker. In the eye of the law, he/she has worked illegally (in contravention of the immigration law) and was barred under the doctrine of illegality (Cabrelli, 2013; Poole, 2014).

Whilst the doctrine of illegality could constitute an instrument to protect the courts from been abused, there is need for the court to allow victims of trafficking for domestic servitude to go after the trafficker/employers for compensation rather than resulting to the CICA for compensation out the public fund (*Hounga v Allen & Anor* [2014] UKSC 47). An exception would be necessary to allow an exploited and or abused domestic worker to seek compensation from the employer whether or not they have been employed legally or illegally. This would send a message to the traffickers/employers that there is penalty to be paid for their action.

*I am not suggesting (that the Government should say) if you work illegally you can have all your employment rights, I can see reasons why they wouldn't want to do that. But then, there must be some ways by which people who are grossly exploited.. if they have been paid 40p and hour, or nothing at all, should be able to bring a discrimination complaint at least into the Employment Tribunals. (JN, Solicitor/Judge)*

The law on illegality as it stands makes it easy for employers to traffic, abuse and exploit their domestic workers knowing fully well that the worker would not be able to seek redress against them. Nonetheless, in addition to immigration constraints and the effect on employment rights, domestic workers are specifically excluded from the national minimum wage, if the employer can show that they have been treated as a member of the family. This law is problematic as reflected in what could be regarded as an injustice for the domestic workers in *Nambalat v Taher & Anor; Udin v Pasha & Ors* [2012] EWCA Civ 1249.

Furthermore, the UK Government has effectively excluded domestic workers from the health, safety, and working time laws that protect the other workers from being exposed to uncontrolled hazards and exploitation. According to the 4<sup>th</sup> edition of the Cambridge Advanced Learner's Dictionary (2013), “if it/a thing is worth doing, it is worth doing well.” If, which is agreed that the household is a workplace, the health and safety of the workers must be prioritised over the private nature of the households.



It is accepted that there are no data on the fatal and nonfatal incidences in the households. However, the lack of data in itself does not confirm that the households are accident free; because they are not. It followed that, if the household holds itself out as a workplace, it should be ready to implement all workplace measures and policymakers must be ready to extend all the labour legislation to cover those who are working in the household. It is worrying that one of the major reasons the UK Government decided not to vote for and or adopt the ILO convention 189 was the possible impact the framework would have on the UK health and safety law. The wellbeing and safety of every worker (those working legally in particular) should concern any democratically elected Government. Considering that the Government officially recognised domestic workers as workers, any decision to exclude them from the protections that are available to the other workers (migrants and non migrants) could sound barbaric and ill informed.

It is accepted that there might be some logistic problems such as inspection, if the health and safety and working time laws are extended to cover those working in the households; this is infact the current situation as in most other workplaces because Government have not got enough workforce to police every workplaces. Thus, if health and safety protection are still availbale to the other workers, logistic problem should not prevent it from been extended to cover those in the households. The mere extension of the laws to cover these workers would send a very strong message to their employers that the health and safety of their workers must be taken seriously. This would also prevent the workers from being bullied by the employer, and would further assist the pregnant worker to assert her employment rights. Accordingly, extending health and safety and working time laws to the households would discourage unscrupulous employers from putting the lives of their workers at risk, whereby improving the wellbeing of the workers.

Finally, this thesis concludes that the poor socioeconomic background of the ODWs, the lack of job prospect and financial opportunity in their countries, and their desperation to seek a greener pastuer abroad are just personal attributes that contribute to their vulnerability, they do not explain the reason for the workers negative experience. The fact that domestic work is a precarious job is one thing, the fact that it is often performed behind the closed door is another. Some employers take advantage of their domestic workers vulnerability because the law allowed them to do so. Employers of domestic workers do not have to worry about the health and safety of their workers because the households are exempted from the health and safety law. Further, the employment law contains many loopholes that employers could rely upon to refuse paying their workers according to the minimum wage, exploit and abuse them with some degree of impunity. These loopholes has also make the vulnerability of the domestic workers worse by shifting the power balance in the households towards the employers.

However, there are many vulnerable workers whose jobs can be described as precarious, yet they do not suffer the same fate as the domestic workers. Whereas other workers could legally challenge their employers excesses, domestic workers have limited rights to challenge their employers. The power to challenge the employer allows other vulnerable workers in precarious jobs to mitigate their vulnerability. Domestic workers are unable to mitigate their vulnerability because the employment law and immigration law have constrained their chances and have removed all the defences they could have relied upon. This thesis argued that employers would not have been able to exploit their domestic workers so badly and or abuse them if the employment law and immigration law have not weaken the workers position.

Nevertheless, the review of literature and the empirical research conducted for this thesis concluded that the key problems of the domestic workers is the immigration law and policy as reflected in the ODWs visa. Although the employment law has unjustly reduced the rights of the workers, immigration law made the residual rights available to the workers unusable. This is because immigration status often dictates employment rights. It is the ODWs visa that compels the bearers to live with their employers and prohibits them from changing employers in the UK. The employment law allowed workers including the domestic workers to bring a claim against the employers if they have been unfairly dismissed.

However, the fact that the ODWs visa only last a maximum of 6 months and it is non renewable means that, with the exception of automatically unfair claims, the ODWs would never be able to bring unfair dismissal claim against their employers. It is not the employment law that makes it difficult for those who have been trafficked for domestic servitude to claim against their traffickers/employers, but the immigration law that bars such claim under the doctrine of illegality. Ironically, rather than making the traffickers liable for their crimes, it is infact the CICA that often foot the bill in serious cases.

Thus, even though the immigration law forbids imigrants from benefitting under the public fund, the fact that CICA is a government agent means that the decision to bar the victims of trafficking for domestic servitude from claiming against the traffickers as in the case of *Hounga v Allen* was ill thought. Considering the poor socio economic background of most of the ODWs, this thesis found that it is highly unlikely that those on the current ODWs visa would return home if their employers stayed in the UK beyond six month. It is therefore more likely that the numbers of illegal/undocumented ODWs in the UK will grow.

It is therefore argued that the root of domestic workers dilemmas lies squarely in the immigration laws and the Government immigration policy that has been unfriendly to the domestic workers.

By restoring the pre-April 2012 ODWs visa, or at least allowing the domestic workers to change employers and renew their visas in the UK, the domestic workers would be positively empowered to mitigate their vulnerability. This could further assist in the control of trafficking, modern day slavery, and forced labour. Better still, by simply extending all of the employment law, health and safety and working time laws to the domestic workers, they would be further empowered and the imbalance of power between the domestic workers and their employers could be balanced.

## **7.2. RECOMMENDATIONS**

Considering the arguments put forward above, the following recommendations are offered:

### **7.2.1. RESTORING THE PRE 6<sup>TH</sup> APRIL 2012 DOMESTIC WORKERS VISAS**

If the pre 6<sup>th</sup> April 2012 ODWs visa is restored, the ODWs will have more rights and legal protections than they currently have. For instance, they will have the right to change abusive and or exploitive employers. The Government is right that the old ODWs visa did not solve all the problems of the domestic workers because it did not. Given the Government' plan to make immigration works by ensuring only the brightest and the best come to the UK, the need to control immigration means that restoring the old visa may not be a viable option. However, considering that the right to change employer was the instrument that allowed exploited and or abused domestic workers to escape their employers in the past, the Government needs to conduct a balancing act between immigration policy and the protection of the vulnerable. The Modern Slavery Act 2015 passed into law on 26 March 2015 consolidated the offences relating to trafficking and slavery, but failed to provide an escape route for those who have been trafficked for domestic servitude because the Government refused to introduce an amendment to the ODWs visa that would have allowed domestic workers to change employers.

Further, this thesis has shown that there are problems with the NRM, such that it is not providing any or dequate protection to victims of trafficking fro domestic servitude. Accordingly, it is argued that if the Government cannot restore the old ODWs visa, an amendment should be introduced to the current ODWs visa to allow the workers to extend their visa beyond 6 months where the employer can justify the need to continue employing the worker – this would be the case where the domestic worker looking after the employer’ child/children has developed a very good relationship with them.

In addition, visa extension should be allowed where the domestic workers who has escaped abusive and/or exploitive employers does not qualify for a discretionary leave to remain under the NRM. Such extension should be considered even where the ODWs are not assisting the law enforcement agent or prosecution on any matter, and where the ODWs have instituted any claim against the employer. This extension would prevent the worker from going underground in an attempt to avoid deportation. This thesis took the Government argument that the old visa gave easy access to indefinite leave too remain into consideration and argued that a further amendment could be introduced to the ODWs visa such that the maximum length of stay at any given time is 2 years. Any domestic worker who intend to change employer after 2 years or whose services are still required by the employers would have to back home and re-apply for a fresh ODWs visa. This break in continuity will fully address the government concern and it will encourage domestic workers to return to their countries knowing fully well that they could re-apply for the ODWs visa to come and their continue their services. Accordingly, such an amendment would assist in reducing trafficking. It would also help to prevent documented domestic workers from becoming undocumented, and as such reduce the problems that face most of them in the UK.

### 7.2.2. SPECIFIC REVIEW OF THE LAW ON ILLEGALITY

Bearing in mind that the current law on illegality prevents victims of trafficking for domestic servitude from claiming against their traffickers/employers and the fact that in some cases, the CICA has to compensate the victims using public fund, a specific review of the law on illegality is required to allow the victims of trafficking for domestic servitude the right to sue the traffickers for compensation. This, in addition to the current law on modern day slavery, will help in sending a very strong message to the traffickers that criminal prosecution and civil litigation against them is a reality.

### 7.2.3. RECOGNISE DOMESTIC WORKERS AS A VULNERABLE GROUP

By officially recognising the domestic workers as a vulnerable group of worker, they would become a protected group, such that policymakers would be mindful of them and have them in contemplation whilst deliberating on laws and policies that may affect them. Accordingly, it mean that the Government would desist from enacting laws such as the National Minimum Wage Regulations 1999 that assist employers to take advantage of the domestic workers vulnerability. It will also prevent policymakers from blocking the adoption and implementation of international frameworks such as the ILO convention 189 that protect domestic workers.

### 7.2.4. ALLOW DOMESTIC WORKERS IN THE DIPLOMATIC HOUSEHOLDS TO CHANGE TO PRIVATE EMPLOYERS

Currently, the ODWs working in the diplomatic households could change employers in so far as the new employer is also a diplomat. The restriction that prevents them from changing to private employers has made their chances of escaping abusive and exploitive diplomat employers very slim. Abused or exploited domestic workers in the diplomatic households are currently finding it difficult to seek justice against their employers because of diplomatic immunity.

It is advocated that if these workers are allowed to change from diplomatic employers to private employers, so long as they could show on the balance of probability that the diplomat employer is abusive and or exploitive, their suffering could be effectively mitigated. More importantly, it will send a very strong message to diplomatic employers that they should not abuse or exploit their domestic workers. The amendment in 2012 to the ODWs visa for those in the diplomatic households stipulated that the maximum time the domestic workers could stay in the UK is 5 years after which they must leave. Given that by accruing 5 years residency, the workers like any other workers would be eligible to apply for an indefinite leave to remain in the UK, how the Government plan would work out is yet to be comprehended. A clear rethink of policy in this respect might be necessary before 2017 when the first batch of those affected by the law would surface.

#### **7.2.5. REMOVAL OF EXCLUSION CLAUSES IN EMPLOYMENT LAWS**

The vulnerability of domestic workers inside and outside the labour market has been intensified by their exclusion from most of the protections that employment laws offered to the other workers. Section 51 of the Health and safety at work etc, Act 1974 specifically excludes domestic workers from health and safety protections. It is appreciated that extending health and safety protection to cover domestic workers may create enforcement difficulties. But, mere extension of the benefit to the domestic workers would send a very strong signal to their employers and put them on notice that they should have their workers' health and safety in contemplation at all times. It will also helps to improve the wellbeing of the workers.

Regulation 19 of the Working time Regulation 1998 excludes domestic workers from most of its protection, especially the aspects that more or less relate to health and safety. As this thesis has argued above, mere extension of this provision to domestic workers would help improve their wellbeing because their employer would be put on notice to give regards to their health and safety by not engaging them work or workload which could comprise their health.

Further, the most widely debated exclusion clause in the employment law that bites into every aspects of the domestic workers is Regulation 2 of the National Minimum Wage Regulations 1999 that allowed employers not to pay their domestic workers according to the minimum wage if they could show that the workers has been treated as a family member. Given the controversy with regards to what it means to be treated as a family member of the employer, it would only make sense for this exclusion to be removed. This thesis found that the exclusion was initially meant to exclude the au pairs from the minimum wage.

Since domestic workers are not similar to au pairs, they should not have been subjected to this exclusion. Finally, it is advocated that the ratification and implementation of ILO convention 189 would provide a better foundation for the long overdue regulation of domestic work in the UK. Given the long history of domestic work in the UK, and given the historic negative experience of especially live-in domestic workers, it is highly surprising that the Government has taken no step to regulate domestic work. It is suggested that a commission that include trade union and employers representative should be charged with overseeing a collective agreement for the domestic workers. The agreement could then stands as a model contract.

### **7.3. THEORETICAL CONTRIBUTION AND IMPLICATION**

The arguments in the literature on the problems of domestic workers focused mainly on the mistreatment of the workers by their employers. This is why the key campaign by Kalayaan and other NGOs and activists has focused on the need for the workers to be able to change employers. However, this thesis has found that the problem of domestic workers in the UK goes beyond their mistreatment by the employers and bite deep into unfavourable Government policy towards this workers and the restriction of their rights in the UK.



This thesis has contributed to our in-depth understanding of the impact of immigration and employment law on the live experience of the domestic workers in the UK. It has also assisted our understanding of the tension between the problems faced by the ODWs, the need for effective immigration control, and Government economic strategies. The thesis has highlighted that although the overseas domestic workers are vulnerable workers who work in precarious settings where the employers have little or no knowledge of their employment rights, the key problem of the workers is the Government immigration policy that is against them and the immigration law as reflected by the ODWs visa.

Accordingly, this research could assist the policymakers to understand the particular area of Government policy that is having negative impact on the domestic workers and the need to bring the UK policy in line with international framework that protect vulnerable workers such as the domestic workers. Finally, this research will serve as a campaign tool to the NGOs, activists, and the media. It could empower the domestic workers, inform academics and practitioners, and improve public awareness of the plights of the domestic workers in the UK and in the world at large.

## **7.4. LIMITATIONS**

This research into the problems faced by domestic workers in the UK is limited to those groups of domestic workers that work in the private and diplomatic households, and that require leave to enter (visa) and work in the UK.<sup>4</sup> Although the analysed data on the interview with the employers of domestic workers provided a very useful insight into the perspective of employers and how the employers related to their workers; more details and clarification could have been obtained if some aspects of the employers' answers to the interviewers' questions were explored further.

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<sup>4</sup> This research also has implication for those who are non-migrants and those who are not live-in domestic workers

Even though the empirical result cannot be generalised, it has provided a very rich data that have shed light on the plights of the domestic workers; whereby contextualising and exposing the root of their problems.

## **7.5. FUTURE RESEARCH OPPORTUNITIES**

One concept that emerged from both the empirical and legal research is the impact of culture on the problems of domestic workers. The issue of culture appeared to reflect in all aspects of the domestic workers live experience such as, the reason for travelling, their recruitment by some employers with whom they share similar ethnic background,<sup>5</sup> the behaviour of the domestic workers in foreign households and how the domestic workers interact with people and/or integrate with the society. Amongst the identified effect of culture are cultural clash, the feeling of inferiority and superiority, exclusion from the mainstream society and the difficulty to integrate. It would therefore be relevant to examine the impact of culture on the lived experience of the foreign domestic workers.

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<sup>5</sup> Some of the employers of domestic workers, especially, those who have been brought before the courts in the UK, are either from the same country as the domestic worker or they share similar ethnic origin as the domestic worker (See *Nambalat v Taher*; *Taiwo v Olaigbe*).

## APPENDICES

1. INTRODUCTION LETTER
2. CONSENT FORM
3. PARTICIPANTS INFORMATION SHEET
4. ETHICS APPROVAL
5. INFORMANTS: FOCUS GROUP AND INTERVIEW SCHEDULE
6. DOMESTIC WORKERS FOCUS GROUP SCHEDULE
7. DOMESTIC WORKERS INTERVIEW SCHEDULE
8. DOMESTIC WORKERS SECOND PHASE INTERVIEW SCHEDULE
9. EMPLOYERS INTERVIEW SCHEDULE
10. UKBA INFORMATIO FOR VISA APPLICANTS
11. DEPARTMENT FOR BUSINESS INNOVATION AND SKILLS - BASIC TERMS  
OF AGREEMENT

Date: 26<sup>th</sup> June 2012

Mr Ismail Idowu salih  
PhD Candidate

Room WG40  
Williams Building  
The Burroughs  
Hendon  
London

E-mail: [i.salih@mdx.ac.uk](mailto:i.salih@mdx.ac.uk)  
Telephone: 0208 411 5842

To whom it may concern,

**Re: Invitation to participate in a Research on migrant domestic workers**

My name is Ismail Salih and I am a PhD Candidate at the Department of Law in the Middlesex University London. I am contacting you in regard to your potential involvement in my current research project, which focuses on the plights and dilemmas of migrant domestic workers in the UK.

The aim of the research is to investigate the problems faced by migrant domestic workers in both private and diplomatic households. A review of the literature revealed the problems faced by migrant domestic workers have their root in immigration and employment law, which provide them with little or no support. This research will examine failed government policies, ambiguities in the employment law and how the justice system (civil and criminal) has been failing migrant domestic workers. Further, this research will examine the pros and cons of State and State agents' immunity, its quintessence and position in our modern day society, in so far as access to justice is concerned.

This research aims to use a mixed method design, with one on one interview to be conducted with individuals, bodies and organisations (governmental and non-governmental) who come into contact with migrant domestic workers. Identified group of people may also be brought together to discuss the issues of migrant domestic workers.

To this end I am writing to you to ask if you would consent to be involved in an interview, taking place either in person or via the telephone, on this topic. If you consent, the interview will focus on issues relating to migrant domestic workers only. The interview would last approximately 45 minutes taking place in between July and August 2012.

Approval from the Middlesex University Ethics Research Committee has been obtained.

If you would like to take part in this research, please contact me using the details provided at the top of this letter. I will provide you with a copy of the participant information sheet and the consent form. You will be entitled to reimbursement for reasonable costs if incurred as a result of your participation in this research. If at any stage you wish to contact me with any questions or comments please do not hesitate to do so.

Yours sincerely,

*Ismail Idowu Salih*

Ismail Idowu Salih



**Participant Identification Number:**

(To be generated by the investigator)

**Title of Research Project:**

The Rights and Dilemmas of Migrant Domestic Workers in the UK: A legal Perspective

**Name of Researcher:** Mr Ismail Idowu Salih

**Please initial box**

1. I confirm that I have read and understand the participant information sheet dated .....2<sup>nd</sup> July 2012.....for the above study and have had the opportunity to ask questions.
2. I understand that my participation is voluntary and that I am free to withdraw at any time, without giving any reason.
3. I understand that my interview may be videoed or taped and subsequently transcribed.
4. I agree to take part in the above research.
6. I agree that this form that bears my name and signature may be seen by a designated auditor.

\_\_\_\_\_  
Name of participant

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Name of person taking consent  
(if different from researcher)

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

\_\_\_\_\_  
Ismail Idowu Salih

\_\_\_\_\_  
Researcher

\_\_\_\_\_  
Date

\_\_\_\_\_  
Signature

**\*\*\*Original copy for researcher**

**\*\*\*Duplicate copy for participant**

2<sup>nd</sup> July 2012



**Middlesex  
University**

**PARTICIPANT INFORMATION SHEET (PIS)**

**1. Study title**

The Rights and Dilemmas of Migrant Domestic Workers in the UK: A legal Perspective.

**2. Invitation paragraph**

You are being invited to take part in a research. Before you decide, it is important for you to understand why the research is being done and what it will involve. Please take time to read the following information carefully and discuss it with others if you wish. Ask the investigator if there is anything that is not clear or if you would like more information. Take time to decide whether or not you wish to take part. **Thank you for reading this.**

**3. What is the purpose of the research?**

The purpose of this research is to explore the effect of immigration, labour law and public international law on migrant domestic workers in the United Kingdom. This will help to determine what status and legal rights do migrant domestic workers have. Further, this paper will explore the political and the social economic impact of migrant domestic workers on the British economy.

**4. Why have I been chosen?**

You have been chosen to participate in this research because you have information on migrant domestic workers which is relevant to this research.

**5. Do I have to take part?**

It is up to you to decide whether or not to take part. If you do decide to take part you will be given this information sheet to keep and be asked to sign a consent form. If you decide to take part you are still free to withdraw at any time and without giving a reason.

**6. What will I do if I decide to take part?**

**If you take part in an interview:**

You will be asked questions on topics which relate to migrant domestic workers. Your recorded views could be used in a report which may be published; however, the report will be written in such a way that you could not be identified.

**If you take part in a focus group:**

You will be asked to sit with a small group of other people who also have information on domestic workers. The investigator will ask the group to debate few issues relating to migrant domestic workers in the UK. The group discussion will be videoed or tape recorded. Your recorded views could be used in a report which may be published; however, the report will be written in such a way that you could not be identified.

**PLEASE NOTE:** You will be expected to respond to the investigators' questions but you are not obliged to answer any question or participate in group discussion.

**8. What are the possible disadvantages and risks of taking part?**

The disadvantages of taking part are:

- a. You will have to sacrifice your time
- b. The investigator's question may remind of something which you would rather forget.

**9. What are the possible benefits of taking part?**

The investigation will help throw light into the problems confronting migrant domestic workers in the United Kingdom and suggest ways in which this group of workers could be assisted with law, government policy and a change in attitude.

**10. Will my taking part in this study be kept confidential?**

The Investigator will abide by the disclosure law of the united kingdom. Be sure that your personal details will not be made available to the general public. All information that is collected about you during the course of the research will be kept strictly confidential. Any information about you which is used will have your name and address removed so that you cannot be recognised from it.

**11. What will happen to the results of the research study?**

The investigator will report to Policy makers and Non Governmental Organisations. The investigator will further publish the result as part of his doctorate studies at the Middlesex University in about 2013. A copy of the publication will be made available at the Middlesex University Library. You will not be identified in the report or the publication.

**12. Who has reviewed the study?**

The Research has been approved and will continually be reviewed by the Middlesex University Ethics Committee.

**13. Contact for further information**

For further information, please contact:

<b>The Investigator:</b> Mr Ismail Idowu Salih Middlesex University School of Law The Burroughs London NW4 4BT Tel: 020 8411 5842 Email: <a href="mailto:i.salih@mdx.ac.uk">i.salih@mdx.ac.uk</a>	<b>Director of Study</b> Professor Malcolm Sargeant Middlesex University School of Law The Burroughs London NW4 4BT Tel: 020 8411 6274 Email: <a href="mailto:m.sargeant@mdx.ac.uk">m.sargeant@mdx.ac.uk</a>	<b>Supervisor</b> Doctor Erica Howard Middlesex University School of law The Burroughs London NW4 4BT Tel: 020 8411 4585 Email: <a href="mailto:e.howard@mdx.ac.uk">e.howard@mdx.ac.uk</a>
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**THANK YOU FOR TAKING PART IN THIS RESEARCH**

**YOU WILL BE GIVEN A COPY OF THIS INFORMATION SHEET AND A  
SIGNED CONSENT FORM TO KEEP**

[Supervisor Login](#)  
[SRCEP Login](#)

# RESEARCH ETHICS APPROVAL FORM

Ref: 567-3-3251

**NAME OF RESEARCHER:** Mr Ismail Idowu Salih

**STATUS:** Postgraduate

**PROGRAMME OF STUDY:** MPhil Middlesex Business School

**NAME OF SUPERVISOR/TUTOR:** Professor Malcolm Sargeant

**NAMES OF ANY RESEARCH COLLABORATORS:** None

**PROPOSED TITLE OF RESEARCH PROJECT:** The Plights and Dilemmas of Migrant Domestic Workers in the UK: A legal Perspective

**BRIEF DESCRIPTION OF THE MAIN AIMS OF THE STUDY:** This research aims to:  
(1) Investigate the importance of domestic workers' visas from a legal standpoint (2) Investigate the factors that predispose migrant domestic workers to vulnerability in the labour market (3) Explore the socioeconomic impact of migrant domestic workers on the British economy (4) Explore the use of legal mechanism in resolving solving the problems of migrant domestic workers. The objectives of this research is to contribute to in-depth understanding of the impact of immigration policies, labour law as well as public international law on migrant domestic workers and assist our understanding of the tension between the problems faced migrant domestic workers, the need for effective immigration control, and government economic strategies. This research will attempt to suggest better ways of engaging this tension.

**HAVE YOU READ AND UNDERSTOOD THE UNIVERSITY'S CODE OF PRACTICE FOR RESEARCH: PRINCIPLES AND PROCEDURES?** Yes

**IS THIS STUDY A LITERATURE REVIEW (LIBRARY STUDY) WHICH DOES NOT INVOLVE COLLECTING PRIMARY DATA?** No

**WILL YOUR RESEARCH INVOLVE:**

a) CONDUCTING INTERVIEWS? Yes

If Yes, state with whom: **Legal Practitioners, Voluntary Organisations, Migrant Domestic Workers, Academics, Workers' Union and Activists.**

b) PARTICIPANT OBSERVATION? No

c) USE OF QUESTIONNAIRE(S) WHICH YOU HAVE DESIGNED? Yes

d) FOCUS GROUPS? Yes

e) OBSERVATION? No

**WILL YOU OBTAIN WRITTEN INFORMED CONSENT DIRECTLY FROM RESEARCH PARTICIPANTS?** Yes

**DO YOU INTEND TO OFFER INCENTIVES TO RESEARCH PARTICIPANTS?** Yes  
If Yes, please specify: Where appropriate, a ten Pounds Argos / Mark and Spencer Voucher

**WILL YOU INFORM PARTICIPANTS OF THEIR RIGHT TO WITHDRAW FROM**



**THE RESEARCH AT ANY TIME? Yes**

**WILL YOU GUARANTEE CONFIDENTIALITY OF INFORMATION TO PARTICIPANTS? Yes**

**WILL YOU GUARANTEE ANONYMITY TO PARTICIPANTS? Yes**

**DOES YOUR RESEARCH METHODOLOGY RAISE ANY SAFETY/LEGAL ISSUES FOR YOU OR YOUR PARTICIPANTS? No**

**DO YOU HAVE ANY ETHICAL CONCERNS ABOUT THIS RESEARCH PROJECT? Yes**

If Yes, please specify: 1. I have been volunteering for a law centre that deals with issues relating to migrant domestic workers. In this instance, I have my own thoughts about the effect of law on this group of people. I have also familiarised myself with their common grievances. 2. An interview with domestic workers would require that they relate their lived experience which could be distressing to some of them. 3. Activists and voluntary organisation associated with migrant domestic workers may be willing to offer informations that could strengthen the case for this group of workers; hence the likelihood of a potential bias

---

## **STUDENT DECLARATION**

THE INFORMATION GIVEN ON THIS FORM IS TRUE TO THE BEST OF MY KNOWLEDGE. I WILL USE THESE METHODS IN MY RESEARCH UNLESS I RENEGOTIATE ANY CHANGES WITH MY SUPERVISOR/ TUTOR.

**STUDENT SIGNATURE .....**      **DATE .....**

**[THE FOLLOWING STATEMENTS ARE FOR THE SUPERVISOR/TUTOR TO TICK AS APPROPRIATE.]**

**a) I HAVE READ THE INFORMATION SUPPLIED ON THIS FORM AND DO NOT THINK THAT IT RAISES ANY ISSUES THAT NEED TO BE CONSIDERED BY SRCEP.**

**b) I HAVE READ THE INFORMATION SUPPLIED ON THIS FORM AND HAVE REFERRED/WILL REFER THE PROPOSAL TO SRCEP FOR THEIR CONSIDERATION.**

**c) THIS PROPOSAL HAS BEEN APPROVED BY SRCEP.**

**SIGNATURE OF SUPERVISOR/TUTOR .....**      **DATE .....**

Please print this form and complete the declaration above. You may also want to save a copy for your records.

Close Window

Save

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# FOCUS GROUP / IN-DEPTH INTERVIEW LEGAL PROFESSIONALS

(July/August 2012)

## THE PLIGHTS AND DILEMMAS OF MIGRANT DOMESTIC WORKERS IN THE UK: A LEGAL PERSPECTIVE.

---

IDENTIFIER No.....

FG/INT

DATE.....

1. What is your Profession?

2. Gender

1. Male

2. Female

3. Prefer not to say

3. How long have you been in practice?

4. How many years of experience working with migrant domestic workers do you have?

**5. Types of client – which are the commonest in your view?**

- a. Overstayers
- b. Illegal
- c. Trafficked

**EXPLORING VIEWS ON DOMESTIC WORK AND DOMESTIC WORKERS**

**6. Why do we need migrant domestic workers?**

*[Allow the informants to express their views on the market for domestic workers in the UK]*

**7. Recent Changes to Visa**

*[Explore the informants view on the current domestic workers visa – allow them to compare the present visa with the old visa regime]*

- a. Changes to the Immigration Rules – pre and post 6<sup>th</sup> April 2012 ODWs visa
- b. Impacts and implications

**8. Migrant domestic workers' problems**

*[First allow the informants to state what they perceive as the problems facing most migrant domestic workers in the UK – then check and probe the followings – if not mentioned by the informants]*

- c. Contract / Statement of terms and conditions
- d. Passport
- e. Wages
- f. Tax and NINO
- g. Working Time – overtime, rest, and holiday
- h. Abuses

**9. Undocumented Workers**

*[Explore the informants experience, view and position on undocumented migrant domestic workers. Then talk round the issue below]*

Language Barrier – taking instructions  
Tribunal experience and settlement of claims

**10. Impact of immunity on illegality – The impact/effect of visas**

*[The aim of this probe is to explore the issue of illegality as it affects domestic workers' claims against their employers. Probe the link, if any with the current domestic worker visa regime and illegality – reference to decided court case(s) might be relevant].*

- a. Visas for MDWs in Diplomatic Households
- b. New Law – 5 years maximum

**11. Trafficking for domestic servitude**

*[Explore the informants view on trafficking for domestic servitude – prevalence in the UK and what may be done to prevent it and support those who have been trafficked]*

- a. Issues around the NRM – recognition and referral
- b. Resident Permits?
- c. Discrimination against women?

**12. Could membership of a union improve the experience of migrant domestic workers?**

*[Probe the suggestion by TUC in 2008 and ILO in 2013 the lack of union membership is part of key domestic workers problems].*

**13. What changes would you like to see in the law that relate to migrant domestic workers?**

*[Allow extensive discussions on what the informants perceive as the legal problems of domestic workers in the UK and their suggestions on overcoming the legal problems].*

# FOCUS GROUP DISCUSSION WITH DOMESTIC WORKERS IN LONDON JULY/AUGUST 2012

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## DISCUSSION PLAN

### **Question 1. General introduction**

*[Ask participants to introduce themselves by stating name and nationality]*

### **Question 2. Why travelling abroad, why the UK**

*[Explore the individual's reason for travelling, whether they came directly to the UK, the purpose of coming to the UK, how long they have been in the UK, any plan of going back home. This should be done in no particular order].*

### **Question 3. Why work as domestic worker**

*[Dream job, learned trade, no other choice]*

### **Question 4. Positive experience in the UK**

*[Benefits, enjoyment, socialising, bring family members over to the UK etc.]*

### **Question 5. Negative experience in the UK**

*[Follow up negative experience with further questions using the participant's answer as a guide, but be mindful of emotional, ethical and privacy issue]*

### **Question 6. Summary and conclusion – How the experience of domestic workers in the UK could be improved**

*[This might involve discussions around the current visa regime and access to justice]*

# IN-DEPTH INTERVIEW DOMESTIC WORKERS

(June/July 2012)

THE PLIGHTS AND DILEMMAS OF  
MIGRANT DOMESTIC WORKERS IN  
THE UK: A LEGAL PERSPECTIVE.

---

## **BACKGROUND**

**1. What is your nationality?**

**2. What is your age?**

\_\_\_\_\_ years old

**3. Gender**

1. Male

2. Female

3. Prefer not to say

**4. Do you currently have a wife/husband or long-term partner?**

1. Yes (Continue with no. 5)

2. No (Skip to no. 7)

**5. Where does your wife/husband/partner currently live?**

**6. Is your wife/husband/partner currently working?**

1. Yes

2. No

**7. Do you have children?**

1. Yes (Continue with no. 8)

2. No (Skip to no.9)

**8. Tell me about your children – How many are they, their age, are they here with you?**

**9. Have you had any vocational training?**

1. Yes (Continue with no. 10)

2. No (Skip to no. 11)

**10. Briefly describe the nature of vocational training received:**

**11. How would you assess your proficiency in speaking, reading and writing English?**

Speaking	b. Reading	c. Writing
Fluent	Fluent	Fluent
Adequate	Adequate	Adequate
Basic only	Basic only	Basic only
None	None	None

**12. Has this proficiency level remained the same before and after your arrival in the UK?**

**13. For how many years in your life have you worked, and where?**

**14. When did you first start work in the UK?**

**15. What was your employment status just before that date? (Refer to date given in 15)**

**16. What were your take-home (net) earnings/income/salary in that job? And what were your average working hours per week in that job?**

**17. Did you purposely come to work as a domestic worker in the UK or were you on a different visa?**

1. Yes (Continue with no. 17)
2. No (case of trafficking?)

**18. When you first entered the UK as a domestic worker how long did you intend to stay and work here?**

## **IMMIGRATION AND RECRUITMENT**

**19. How did you come to be a domestic worker in the UK?**

*Objective: to explore motivations, expectations, and processes of migration.*

- What stage of life were they at (Recently unemployed? Family changes?)



- What had they been working as before they came to the UK and how much had they been earning?
- Did they choose the UK? If so, why?
- What did they imagine it would be like?
- Did they come straight to the UK or stay in other countries?
- How traveled and found employment (links between travel agencies, recruiters, employment). Were they offered work before they came?
- How did they finance the trip (loans)

## **EMPLOYMENT AND LIVING CONDITIONS**

**20. Can you tell me about the host families and other jobs you've had while you've been in the UK?**

*Objective: to gather an employment history*

- How many host families have they had
- why did they change?
- how did they find new families?
- Casual work (cleaning, waitressing etc) as well as au pairing
- Do they go to English classes?

**21. Can you describe the work as a domestic worker?**

- type of jobs done
- hours, days, rests, holiday
- relations with the employer family
- Do you enjoy your job(s)? What is good and bad about it/them

**22. Do you have a written agreement?**

*Objective: to understand the impact of different levels of formality*

- What are the advantages and disadvantages of having a written agreement?
- What would happen to your jobs if you were sick for a month?
- What would happen if you injured yourself at work?

### **23. Who holds your passport?**

- If it is anyone other than you, who holds it and how did this happen?
- Has it ever been a problem in a previous job?
- Have you ever tried to get a passport back?
- do you feel this is a problem for you?

### **24. How much do you get paid?**

*Objective: to understand the "micro-economics" of individual's wage.*

- How much do you get paid for all your jobs?
- Are there deductions from your salary for travel, recruitment costs, loans, payment to employment agents, uniforms, accommodation etc? Was it clear from the outset that these deductions would be made? Do you know how much they are worth?
- Are you paid overtime?
- What non-wage benefits do you get that you know of e.g. accommodation, food, bills, insurance, health-care
- Do you feel you get a fair deal?

### **25. Can you describe your accommodation at your employer's premises?**

- Do you live in with your employer family? If not, why not? What are the advantages and disadvantages of living in?
- Do you feel you can use the house as your home?
- Do you have your own bedroom?
- Is it in a neighbourhood that you like (services, people, fellow nationals around?)
- How did you find your accommodation?
- Are you happy with your accommodation?

### **26. What do you do outside work for relaxation?**

*Objective: to explore non-employment networks*

- Are you a member of any institutions or associations?
- Who do you relax with? Do you know many fellow nationals? Are they mainly domestic workers?
- Use of local leisure facilities?

- Place of worship
- Where do you go for advice/help?
- What contact with non migrants outside work – very little / a lot
- Any contact with policy/ immigration authorities. Two authorities
- Public service
- Health
- Education
- English classes

**27. What do you think are the good and bad things about the migrant domestic worker jobs?**

- is it just another job?
- would you rather work in a different sector?
- is it easy to meet people?
- is staying with your employer a good or bad thing?
- would you recommend domestic work to your friends?
- what advice would you give to someone from your country intending to work as a domestic worker?

**28. Do you feel “at home” in the UK?**

*Objective: to discuss social capital in UK and transnational behaviour*

- Do you feel welcome in the UK:
- Would you like to stay permanently in the UK?
- How often do you contact your country of origin and how do you do so?
- Do you send money home regularly? How often? And how (Western Union, remittance company, friends)
- Have you returned home for any visits recently?
- Do you get any publications or newspapers?
- Do you go to any places to meet up with fellow nationals?
- Do you have any British friends?

# SECOND PHASE INTERVIEW WITH OVERSEAS DOMESTIC WORKERS IN LONDON

## INTERVIEW TRANSCRIPT

### MAY – JULY 2014

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**AIM: TO EXPLORE LEGAL ISSUES WITH DOMESTIC WORKERS**

#### **Question 1. Background information**

**Objective:** to settle the participants and collect valuable descriptive data.

**Plan:** ask every participant to tell their age, sex, marital status, place of origin/nationality, years of working as domestic worker, length of residence in the UK, and whether family is in the UK or abroad. Ask whether their employer is a diplomat or private person(s). Ask how they begun to work as a domestic worker – how they get the job, whether they were employed directly from their home country or came to the UK via a third country. Lastly ask how many households they have worked for so far?

#### **Question 2. The opener**

**Objective:** to allow participants the chance to summarise what they perceive as the problems facing domestic workers in the UK. The essence of this is to see if participants see law and the legal system as a problem at all

**Plan:** ask to the participants if they are asked to summarise the problems faced by domestic workers in the UK, how do you answer that question?

#### **Question 3. Knowledge of Employment and Human Rights**

**Objective:** to explore the participants' awareness of employment and human rights in the UK and how these rights affect them.

**Plan:** ask participants if they have ever heard about human right? If yes, in what context? Ask what if any, the participants know about employment right in the UK. As persons working for other households, what do they think are their rights?

#### **Question 4. Immigration status**

**Objective:** to explore whether the participants enter the UK legally, their current immigration status, and their plan, if any to return to their country.

**Plan:** ask how the participants have travelled to the UK, whether they still possess valid visa, whether they are aware that a valid authorisation is required to work as domestic workers, how long they planned to stay in the UK, whether they are happy to return home before or at the expiration of their visa, and why? Where issue of trafficking has been raised, explore this further.

**Question 5. Contract / statement of terms and conditions**

**Objective:** to explore the nature and terms of agreement, and whether written evidence was issued.

**Plan:** ask to the participant whether and how they negotiated the terms of their employment contract, whether they were provided with contract or statement of terms and condition, whether the statement represents what was agreed, and whether the initial agreement remain the same or altered in any way?

**Question 6. Wages / salary**

**Objective:** to explore if the participants receive any payment for their work. To assess if the workers were paid according to the national minimum wage

**Plan:** ask the participants if, when, how, and how much they were paid. Whether the payment is in accordance with their agreement? Any other payments like bonus, incentive, holiday pay, and sick pay.

**Question 7. Working condition / time**

**Objective:** to investigate the workers general working condition

**Plan:** ask the participants to describe their working condition/environment, daily routine, working hours, rest period, and number of days off per week.

How do you describe your work condition (probe food accommodation, privacy, working hours, rest). Are you obliged to remain in the household during your time of rest?

**Question 8. Living condition / accommodation**

**Objective:** to understand the nature of accommodation that live-in domestic workers are offered.

**Plan:** ask participants to state whether they are live-in or live-out domestic workers. If live-in, ask participants to describe their employers' households, available accommodation, and whether they were provided with own/separate room. If provided with a room, whether the room has any lock.

**Question 9. Family member treatment**

**Objective:** to explore the work and social relationship between the participants and their employers

**Plan:** ask participants to summarise the relationship between them and their employers. Depending on the response, probe whether they eat together, socialise together and go on holiday together.

**Question 10. Disciplinary action**

**Objective:** to explore whether employers of domestic workers comply with statutory disciplinary procedures

**Plan:** ask participants if they have ever get conflict with others with in a household. Whether they have been investigated, warned, or dismissed by their employers.

**Question 11. Abuses and exploitation**

**Objective:** to investigate some of the treatment of domestic workers by their employers that may amount abuse and/or exploitation.

**Plan:** ask participants whether they have been physical abused by their employers. Ask them to comment about the treatment of them (good and bad) by their employers. If participants state that they have not been treated fairly, ask why.

**Question 12. Health and Safety**

**Objective:** to investigate history of work related injury and wellbeing of domestic workers

**Plan:** ask if they have ever been ill or injured since they arrived in the UK. Ask if they are registered with a GP. Probe if they have ever suffered any injury whilst working in the household. If yes, the nature of the injury and how it was dealt with.

**Question 13. Catch all Question**

**Objective:** to ensure all relevant information has been explored.

**Plan:** ask participants if there is any aspect of UK law affect their experience as a foreign national, and as a worker. If yes, state which aspect(s) and suggest how it/they could be improved.

## **INTERNATIONAL SURVEY ON THE EMPLOYMENT OF DOMESTIC WORKERS IN PRIVATE HOUSEHOLDS**

This survey forms part of an international study on demand for the services provided by domestic workers that will allow us to compare households in six very different countries - India, Italy, Thailand, UK, Spain and Sweden. The study is important because employment of domestic workers is becoming more and more common in most countries of the world, as households must find ways of coping with social and economic pressures. Yet the need for such workers is largely unrecognised by national and international policy makers. We would therefore be extremely grateful if you can spare the time to contribute to the research by filling out this questionnaire.

**The questionnaire is completely anonymous and confidential.**

Some of the questions are of a personal nature, and we therefore ask you to seal your completed questionnaire in the envelope provided before returning it to the researcher.

Many thanks for your valuable contribution to this research.

Professor Julia O'Connell Davidson

1. Please state your nationality \_\_\_\_\_

2. Please state your occupation \_\_\_\_\_

3. Are you (*please circle*)

Male

Female

4. Please circle the age group you fall into:

Under 18

18-21

22-30

31-40

41-50

51-60

61-70

71+

5. Please circle your current living arrangements:

Single

Married, living together

Married, living apart

Co-habiting with man

Co-habiting with woman

Divorced

Widowed

6. Do you have any children living with you?

Yes

No

If yes, please write their ages

7. *[We need each team to frame race/ethnic/religious identity question, preferably based on categories used in their own country's census, along the lines of 'How would you describe your ethnic background?']*

8. *[We need each team to frame educational level question, preferably based on categories used in their own country's census. Please keep this simple]*



**9. Please circle which of the following income groups your family falls into:**

*[We need each team to come up with **figures** in their country that would cover:*

- i) Low (e.g. under \$x)
- ii) Middle (e.g. \$x - \$x)
- iii) upper middle to very high (e.g. over \$x)]

**IF YOU DO NOT EMPLOY DOMESTIC WORKERS or CLEANERS or AU PAIRS PLEASE GO TO QUESTION 11.**

**10. Please describe your current employment situation by filling out the boxes below for each worker you employ. *[If you are currently employing more than 4 people in your home, please continue below the table.]***

	Live-in	Live-out	Gender	Age	Nationality	Job title	Pay per week	How initial contact made
Worker 1								
Worker 2								
Worker 3								
Worker 4								

**11. Please indicate whether you agree or disagree with the following statements:**

	<b>Strongly Agree</b>	<b>Agree</b>	<b>Disagree</b>	<b>Strongly Disagree</b>	<b>Don't know</b>
"It is in women's nature to be more caring than men"					
"My home says something about the kind of person I am"					
"Women should not go out to work"					
"In general, men don't do enough around the house"					
"Children should regularly help around the house"					
"People shouldn't bring work home with them"					
"Children should respect parents' authority"					
"I can be more my real self at home"					
"When possible, a mother's care is best for a child"					

**12. Could you indicate, in general, who usually does the following household tasks in your home. If the task is usually shared you may tick more than one column.**

	<b>Self</b>	<b>Domestic worker(s)</b>	<b>Partner</b>	<b>Parent/child/relative in household</b>	<b>No one/not applicable</b>
Dusting					
Floor washing					
Reading to children					
Cleaning toilets					
Shopping					
Cooking					
Feeding children					
Washing the car					
Washing					

clothes					
Looking after pets					
Ironing					
Tidying up					

**13. What is the youngest age at which a person should be allowed to be paid for work in private households and what is the youngest age at which a person should be allowed to take on other forms of full time employment, such as factory or shop work?**

	<b>Domestic worker</b>	<b>Other forms of employment</b>
Under 10		
10-13		
14-15		
16-18		
19-21		
21+		
Don't know		

**14. Which of the following do you consider should be rights for all domestic workers ?**

- Paid maternity leave
- A written contract of employment directly with employer
- Discipline the children as they see fit
- Sick pay
- A written contract with their agent
- An annual visit home
- Trades union membership
- Regular days off
- Holiday pay
- Use their employer's telephone
- Pension
- Minimum wage
- A work permit (if come from abroad)
- Fixed hours of employment
- Change employer with one month's notice

- None of the above – it's up to individuals to negotiate

**15. Which if any of the following would you consider legitimate additional rights for live-in domestic workers**

- Their own room
- Use their employer's telephone
- Bring boyfriends (?) to the house
- Eat employer's food
- Use the house as their own
- None of these

**16. Do you believe that paid domestic work should be monitored/regulated?**

- No, most employers can be relied on to give them their rights
- No, it's up to individuals to negotiate depending on their own situations
- Yes
- None of the above

**IF YOU DO NOT EMPLOY A DOMESTIC WORKER or CLEANER or AU PAIR PLEASE GO TO QUESTION 28.**

**17. Looking at the following statements, which for you are the THREE that best describe your reasons for employing a domestic worker**

- Child/elder-care available when I need it
- Allows me to go out to work
- Increases household security
- Allows me to entertain
- Stops arguments over housework
- Allows me to have more time with children
- Allows me to have more time with partner
- Helps her to improve her situation
- It's impossible to live without one
- It's cheaper than other options available
- Keeps the house clean and tidy
- Provides more personal child/elder care than other options available
- Gives me some company in the house

**18. For how many years have you employed domestic workers?**

**19. How many domestic workers have you employed in this time?**

**20. Would you ever consider employing a male domestic worker?**

- Yes, but only as a cleaner
- Yes, but only as a carer
- Yes as both cleaner and carer
- No

**21. Please state who takes primary responsibility for employing and managing domestic workers in your household**

- Self
- Partner
- Other relative living in the household
- Agency

**22. What is/would be your preferred method of finding a new employee**

- Word of mouth
- Formal agencies
- Small ads
- Community/religious organisations
- Combination of the above

**23. Looking at the following statements, can you pick THREE that best describe the negative aspects of employing a domestic worker?**

- She can use your home as her own
- You are vulnerable to gossip
- You don't feel free to do as you like inside your home
- You have to deal with her personal problems
- You spend money but get nothing back
- You have to deal with too much bureaucracy
- You have to worry about her stealing
- You have to think about her influence over your children
- You have to think about her influence over your husband
- She can become jealous of your position
- It's socially unacceptable
- It's very expensive
- You have to keep up standards of tidiness
- It's too much responsibility
- You feel guilty

**24. Have ever employed domestic workers who are under the age of 18?**

- Yes
- No

**25. Which of the following statements do you agree with (please tick all that apply):**

- I would pay someone under 18 to help out with light tasks
- I would pay someone under 18 to help out on an occasional basis
- I would employ a domestic worker under the age of 18 if they were desperate for work.
- I would never consider employing a domestic worker under the age of 18
- I would be quite happy for my daughter to be a full-time domestic worker.

**26. If you found your domestic worker entertaining friends at your house without permission, which of the following measures would you apply (*You can tick more than one*)**

- Verbal warning
- Dismissal
- Take some money from her pay
- Give her a particularly difficult task
- Confine her to her room
- Physical punishment
- Inform her relatives
- Other (please specify)
- I wouldn't do anything

**27. Using the list below please tick **THREE** reasons for employing a **MIGRANT** as a domestic worker**

- They are prepared to work flexible hours
- They are more caring than locals
- They cost less than locals
- They need the opportunity more than locals
- They are more suited to domestic work than locals
- They do not get distracted by family and friends
- They are more hardworking than non-migrants
- They are more likely to stay for a long time
- They are more willing and co-operative
- It's more fashionable to have migrants
- Migrants are the only workers available for this job
- They don't gossip as much as locals
- It is easier to share your home with a migrant than a local.
- You avoid bureaucracy by employing a migrant
- Migrants have greater incentives to work

**28. Would you say that any of the adjectives below describe the typical MIGRANT domestic worker. (NB you can go by reputation if you do not have direct experience**

	<b>Nationality x domestic worker</b>	<b>Nationality y domestic worker</b>
Professional		
Attractive		
Shy		
Enthusiastic		
Cheap		
Educated		
Caring		
Feminine		
Obedient		
Dark skinned		
Light skinned		
Clean		
Expensive		
Respectful		
Poor		
Natural		
Young		
Mature		
Friendly		
Independent		
Assertive		
Hard working		
Intelligent		
Innocent		
Attentive to detail		

**IF YOU DO NOT EMPLOYER A DOMESTIC WORKER or CLEANER or AU PAIR PLEASE GO TO QUESTION 33.**

**29. How would you rate non-migrant and migrant domestic workers in terms of the following:**

**Cost**

	Very cheap	Cheap	Average	Expensive	V expensive
Local					
Migrant					

**Reliability/retention**

	V. reliable	Reliable	Average	Unreliable	V unreliable
Local					
Migrant					

**Enthusiasm**

	Very hardworking	Hardworking	Average	Lazy	Very lazy
Local					
Migrant					

**Dependence on employer**

	Very dependent	Dependent	Average	Independent	Very independent
Local					
Migrant					



*For the following questions, if you employ more than one domestic worker, please consider your most senior employee*

**30 . Using the list below, please tick the three qualities you would MOST want to find in a domestic worker, and the three you would AVOID**

	Three qualities I look for	Three qualities I avoid
Professional		
Attractive		
Shy		
Enthusiastic		
Cheap		
Educated		
Caring		
Feminine		
Obedient		
Dark skinned		
Light skinned		
Clean		
Expensive		
Respectful		
Poor		
Natural		
Young		
Mature		
Friendly		
Independent		
Assertive		
Hard working		
Intelligent		
Innocent		
Attentive to detail		

**31. Would you characterise your relationship as**

- Friendly
- Professional
- Friendly and professional
- None of the above

**32. In addition to her salary, which, if any, of the following items do you give to your domestic worker**

- Gifts for special occasions
- Toiletries
- Sanitary protection
- Food
- Clothes
- Toys
- Tips
- None of these

**33. Have you heard stories or reports about women being trafficked into domestic work?**

- Yes
- No

**34. How do you think employers should respond if agencies offer them domestic workers whom they suspect have been trafficked into domestic work**

- Treat her like any other worker
- Employ them and pay them extra
- Report the domestic worker to the police
- Report the agency to the police
- Take it up with the agency
- Choose a different worker who has definitely not been trafficked

**35. How do you think people should respond if they come across a worker whom they think is being violently abused by her employer**

- Treat her like any other domestic worker
- Give her a tip
- Offer to help her escape
- Report it to the police
- Take it up with her employer

**THANK YOU for taking part in this research. If you have any further comments on any of the issues covered in this questionnaire, please write them overleaf.**



Dear Overseas Domestic Worker applicant

You have applied for a visa to go to the UK as an Overseas Domestic Worker. Overseas Domestic Workers work in the private home of a visitor to the UK, or in the private home of a diplomat who is posted to the UK.

You and your employer will have already agreed your conditions of employment, for example your working hours, pay and time off. You will have also agreed your role and duties, which could include looking after children, cooking or cleaning.

You should have signed a document showing these as part of your visa application, and your employer should have given a copy to you.

If you are granted a visa, it will be placed in your passport. You, not your employer should retain your passport. It contains your permission to be in the UK and is your identification.

**(a) What will happen when I arrive in the UK?**

On your arrival at the UK border, you and your employer will see a Border Force Officer. The officer will check the visa in your passport, and ask you about your reason for coming to the UK and how long you will stay. If the officer is satisfied that there have been no changes in your circumstances, or your purpose in coming to the UK since you obtained your visa, you will be allowed to enter the UK.

**(b) How long you can stay in the UK and what you can and can't do**

The length and conditions of your visa will depend on whether you are working in the home of a visitor to the UK or in the home of a diplomat.

- **If you are working in the home of someone who is visiting the UK**, you must travel with or join that employer in the UK and you can work only for them. You must leave the UK when your employer does or at the end of 6 months whichever is sooner. You cannot bring members of your family with you.
- **If you are working in the home in the UK of a diplomat**, you must travel with or join them there and can work only for them. When they leave the UK so must you. Your visa will initially be for 24 months and before the end of that time, if your employer is still in the UK and you are still working for them, you may apply to stay longer. If this is granted you will be able to stay for another 12 months. You can apply to extend your visa each year - up to a total period of 5 years. At the end of 5 years or when your diplomat leaves

the UK you must also leave. You can bring members of your family with you and they may work, but they must leave the UK when you do.

Further information is available on the UK Border Agency website.

**(c) What do I do if I have problems with my employment?**

Like UK workers you will have a number of rights. These include a right to be paid according to the National Minimum Wage Act 1998. If, once you are in the UK, you have any worries about your work situation or you think your employer is not respecting your rights, you can seek help and advice from the Pay and Work Rights Helpline on 0800 917 2368 or the ACAS Helpline on 0845 474 747. Advice is available in a number of languages. Alternatively you can call the charity Kalayaan – see below.

Further information about the Pay and Work Rights Helpline is on:

[http://www.direct.gov.uk/en/DI1/Directories/DG\\_177940](http://www.direct.gov.uk/en/DI1/Directories/DG_177940) and the ACAS helpline on : <http://www.acas.org.uk/index.aspx?articleid=2042>

**(d) Where to go for more information, advice and help you if you are in difficulty**

Everyone in the UK has the right to be treated properly and with respect. If you think you have been a victim of crime you can go to your local police station or in an emergency phone 999

If you think you have been /are being mistreated in any way (for example you haven't been given any time off, or there are problems with your pay) or you have been a victim of crime, you can talk to one of the following organisations who will provide you with confidential, independent advice:

- Kalayaan  
St Francis Centre  
13 Hippodrome Place  
London  
W11 4SF  
  
020 7243 2942
- Unite  
128 Theobalds Road  
London  
WC1X 8TN  
  
020 7611 2500

If you decide you want to return home, you can contact your country's Embassy or High Commission in the UK. Alternatively, Choices, a charity, can offer you confidential advice and information about returning home voluntarily. You can contact them on 0808 800 0007.

**April 2012**

# Your basic terms of employment

This is an example of a Written Statement of Employment Particulars form meeting the requirements of employment legislation. Guidance on completing this form is at the end of the document.

For a detailed explanation of these requirements see: **Putting together an employee's written statement** ([www.businesslink.gov.uk/writtenstatement](http://www.businesslink.gov.uk/writtenstatement)).

## Written Statement of Employment Particulars

### P1

Name of employee

began employment with (name of employer)

on (date)

### P2

\*a. Your previous employment with

does count as part of your period of continuous employment which therefore began on

or

\*b. Your previous employment **does not** count as part of your period of continuous employment

### P3

a. You are employed as (job title)

or

b. A brief description of the work for which you are employed is:

### P4

a. Your place of work is (address)

b. You are **\*required/permitted** to work at the following places

and the address of your employer is

### P5

Your pay will be



**P6**

You will be paid (weekly, monthly etc)

**P7**

Your hours of work are

**P8**

Your holiday entitlement is

**P9**

a. In case of incapacity to work

or

b. Particulars of any terms and conditions relating to incapacity to work due to sickness or injury, including any provision for sick pay, **can be found in**

**P10**

a. Particulars of pensions and pension schemes are

or

b. Particulars of terms and conditions relating to pensions and pension schemes, **can be found in**

**P11**

a. The amount of notice of termination of your employment you are entitled to receive is

The amount of notice you are required to give is

or

b. Particulars of the amount of notice of termination of your employment you are entitled to receive and are required to give **are given in**

**P12**

a. Your employment is permanent – subject to 11 above, to general rights of termination under the law and to the following

or

b. Your employment is for a fixed term and expires on (date)

or

c. Your employment is temporary and is expected to continue for

*This should only be used as an indication of the likely duration*

**P13**

The collective agreements which directly affect the terms and conditions of your employment are

**P14**

\*a. You are not expected to work outside the UK (for more than one month)

or

\*b. You will be required to work in

For

You will be paid in (currency)

and will be entitled to

The terms relating to your return to the UK are

**P15**

a. The disciplinary rules which apply to you are

or

b. The disciplinary rules which apply to you can be found in

**P16**

a. The disciplinary and dismissal procedure which applies to you is

or

b. The disciplinary and dismissal procedure which applies to you can be found in:

**P17**

If you are dissatisfied with any disciplinary or dismissal decision which affects you, you should apply in the first instance to (name of officer)

**P18**

You should make your application by

**P19**

If you have a grievance about your employment you should apply in the first instance to (name of officer)

**P20**

You should make your application by

**P21**

- a. Subsequent steps in the firm's disciplinary, dismissal and grievance procedures are

or

- b. Subsequent steps in the firm's disciplinary and grievance procedures are set out in

**P22**

A contracting-out certificate under the Pensions Schemes Act 1993

**\*is/is not** in force for the employment this statement is being issued for

*\*delete as appropriate*



# Notes for completion of form

## Introduction

The written statement may be provided either:

- a) as a single document;  
or
- b) in a number of instalments – *provided that certain details, dealt with in paras 1–8, are always given together in the same instalment.*

All instalments must be given to the employee not later than two months after he/she starts work or if, at an earlier stage he/she is required to work outside the UK for more than one month, not later than his/her departure.

Unless otherwise indicated, all particulars must be set out in the statement itself and **not** be given by reference to: a collective agreement; a handbook; or any other document which does not form part of the written statement.

Lengthy or complicated particulars may be given on a continuation sheet or via an attached booklet or other annex – *provided it is clear that this is integral to the statement, or the relevant instalment of it, and forms part of the same document.*

### Where there are no particulars to be given for paras 1–14, the statement must say so in each case.

Some of the separate stages in paras 15–21 may be combined where, for example:

- a) the same person is the first to be approached for appeals against disciplinary or dismissal decisions **and** for grievances;  
or
- b) the method of application in both cases is the same.

Explanatory notes for completion are given in the right hand column on each page.

Note:

Some terms and conditions of employment are subject to statutory requirements, eg rates of pay, working hours and holidays, notice of termination of employment and disciplinary and grievance procedures. For information please see: A detailed guide to the national minimum wage, Your guide to the Working Time Regulations, Rights to notice and reason for dismissal and the Resolving disputes web page.

Further information and practical help can be found at [www.businesslink.gov.uk/employingpeople/](http://www.businesslink.gov.uk/employingpeople/)

### Insert:

#### P1:

- 1 Name of employee
- 2 Name of employer
- 3 Date employment started

#### P2: *\*delete (a) or (b) as appropriate*

- 4 Name of previous employer or employers
- 5 Date period of continuous employment commenced

#### P3: *(complete (a) or (b), delete the other)*

- 6 Job title
- or
- 7 Brief work description

#### P4: *(complete (a) or (b), delete the other)*

- 8 Address of workplace
- or *\*delete as appropriate*
- 9 Give details
- 10 Address of employer

#### P5:

- 11 Particulars of scale or rate of remuneration, or of the method of calculating remuneration

**P6:**

- 12 Particulars of intervals at which remuneration is to be paid

**P7:**

- 13 Particulars (see note above) – including details of any normal working hours

**P8:**

- 14 Particulars (see note above) – including entitlement to holiday pay and public holidays. You **must** give enough information to enable entitlement, including accrued holiday pay on termination, to be precisely calculated.

**P9:** *(complete (a) or (b), delete the other)*

- 15 Terms and conditions relating to sickness or injury and any provision for sick pay

or

- 16 Refer to provisions of some other document which the employee has reasonable opportunities of reading in the course of his or her employment or which is made reasonably accessible to him or her in some other way

**P10:** *(complete (a) or (b), delete the other)*

- 17 Particulars

or

- 18 Refer to provisions of some other document which the employee has reasonable opportunities of reading in the course of his or her employment or which is made reasonably accessible to him or her in some other way

**P11:** *(complete (a) or (b), delete the other)*

- 19 Period of notice

- 20 Period of notice

or

- 21 Refer to relevant legislation or the provisions of any collective agreement directly affecting the terms and conditions of the employment, which the employee has reasonable opportunities of reading in the

course of his or her employment or which is made reasonably accessible to him or her in some other way

**P12:** *(complete (a) or (b), delete the other)*

- 22 Details of any other rights of termination

or

- 23 Date

or

- 24 Period of likely duration

**P13:**

- 25 Details identifying the relevant agreements and indicating, where the employer is not a party, the persons by whom they were made

**P14:** *\*delete (a) or (b) as appropriate*

- 26 Delete words in brackets if they are inappropriate

or

- 27 Details of work location outside the UK

- 28 Period of work outside UK, where more than one month

- 29 Currency

- 30 Details of any additional remuneration payable to the employee, and any benefits to be provided, because he/she is required to work outside the UK

- 31 Details

**P15:** *(complete (a) or (b), delete the other)*

- 32 An explanation of the rules

or

- 33 Refer to provisions of some other document which the employee has reasonable opportunities of reading in the course of his or her employment or which is made reasonably accessible to him or her in some other way

**P16:** *(complete (a) or (b), delete the other)*

34 An explanation of the procedure

or

35 Refer to provisions of some other document which the employee has reasonable opportunities of reading in the course of his or her employment or which is made reasonably accessible to him or her in some other way

**P17:**

36 Name of person application should be made to, or position held (*eg supervisor*)

**P18:**

37 Explain how applications should be made

**P19:**

38 Name of person grievance should be raised with, or position held (*eg personnel officer*)

**P20:**

39 Explain how grievances are to be raised

**P21:** *(complete (a) or (b), delete the other)*

40 An explanation of the steps

or

41 Refer to provisions of some other document which the employee has reasonable opportunities of reading in the course of his or her employment or which is made reasonably accessible to him or her in some other way

**P22**

42 For further information on contracting out certificates, call 0845 600 2622